LIBRARY
SUPREME COURT, U. S.

In the Supreme Court
OF THE
United States

Office Supreme Court, U.S.
FILED
FEB 19 1968
JOHN F. DAVIS, CLERK

OCTOBER TERM, 1967

No. 1127

ATLANTIC INSURANCE COMPANY, COMMERCIAL INSURANCE COMPANY, COMMERCIAL STANDARD INSURANCE COMPANY, EMPLOYERS CASUALTY COMPANY, GENERAL INSURANCE CORPORATION, GULF INSURANCE COMPANY, HOUSTON FIRE AND CASUALTY INSURANCE COMPANY, INTERNATIONAL SERVICE INSURANCE COMPANY, MARATHON INSURANCE COMPANY, NATIONAL STANDARD INSURANCE COMPANY, REPUBLIC INSURANCE COMPANY, SECURITY NATIONAL INSURANCE COMPANY, SOUTHERN INSURANCE COMPANY, SUPERIOR INSURANCE COMPANY, TRANSPORT INSURANCE COMPANY, TRINITY UNIVERSAL INSURANCE COMPANY, UNITED SERVICES AUTOMOBILE ASSOCIATION, VANGUARD INSURANCE COMPANY,

Appellants,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,

Appellee.

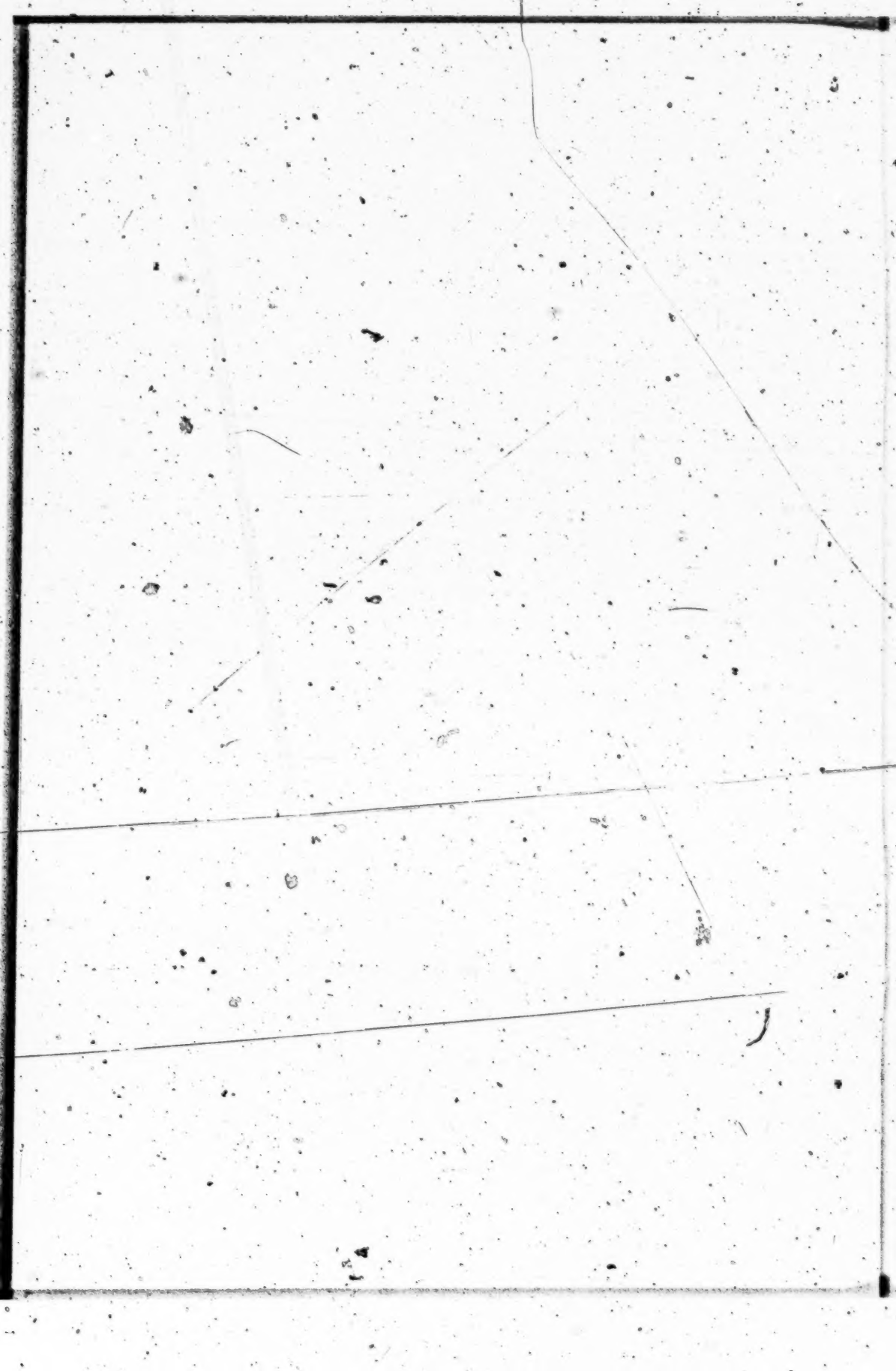
On Appeal from the Court of Appeal of the State of California, First Appellate District, Division Four.

JURISDICTIONAL STATEMENT

BERT W. LEVIT
465 California Street,
San Francisco, California 94104
VICTOR B. LEVIT
465 California Street,
San Francisco, California 94104
Counsel for Appellants

Of Counsel
LONG & LEVIT
465 California Street
San Francisco, California 94104

... PRINTING CO., SAN FRANCISCO



Subject Index

	Page
Opinion below	2
Jurisdiction	2
Questions presented	3
Statutes involved	4
Statement	4
The questions are substantial	6

Table of Authorities Cited

Cases	Pages
Connecticut General Life Ins Co v Johnson (1938) 303 US 77	8
Fire Association of Philadelphia v New York (1886) 119 US 110	7
Hanover Fire Ins Co v Carr (1926) 272 US 494	3, 7, 8
Lincoln National Life Ins Co v Read (1945) 325 US 673	7
Ozark Butane Co Inc v Oklahoma Liquefied Petroleum Gas Board, et al (1964) 369 US 885, 235 Fed Supp 406 (DC WD Okla 1964) 380 US 928	6, 7
Prudential Ins Co v Benjamin (1946) 328 US 408	7
Prudential Ins Co v Hobbs (1946) 328 US 823, 160 Kan 300, 161 Pac 2d 726 (1934)	7
Reserve Life Ins Co v Bowers (1965) 380 US 258	3, 8
Southern Railway Co v Greene (1910) 216 US 400	3, 7

Pages

State Board of Ins v Todd Shipyards (1962) 370 US 451 ... 8

Wheeling Steel Corp v. Glander (1949) 337 US 562 ..... 3, 8

Codes

Insurance Code (Stats 1959 Ch 2120 Section 1 pp 4945-4946):

Section 685 ..... 2, 3, 4, 5
Section 685.1 ..... 2, 3, 4, 5
Section 685.2 ..... 2, 3, 4, 5
Section 685.3 ..... 2, 3, 4, 5
Section 685.4 ..... 2, 3, 4, 5

Revenue and Taxation Code:
Section 13102 2

28 U.S.C. Section 1257(2) 3

Constitutions

United States Constitution:
Article I, Section 8, Clause 3 ..... 3, 4, 5, 6
Fourteenth Amendment 3, 4, 5

Texts

Patterson, "The Insurance Commissioner in the United States" (1927), p. 107 9

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No.

ATLANTIC INSURANCE COMPANY, COMMERCIAL INSURANCE COMPANY, COMMERCIAL STANDARD INSURANCE COMPANY, EMPLOYERS CASUALTY COMPANY, GENERAL INSURANCE CORPORATION, GULF INSURANCE COMPANY, HOUSTON FIRE AND CASUALTY INSURANCE COMPANY, INTERNATIONAL SERVICE INSURANCE COMPANY, MARATHON INSURANCE COMPANY, NATIONAL STANDARD INSURANCE COMPANY, REPUBLIC INSURANCE COMPANY, SECURITY NATIONAL INSURANCE COMPANY, SOUTHERN INSURANCE COMPANY, SUPERIOR INSURANCE COMPANY, TRANSPORT INSURANCE COMPANY, TRINITY UNIVERSAL INSURANCE COMPANY, UNITED SERVICES AUTOMOBILE ASSOCIATION, VANGUARD INSURANCE COMPANY,

Appellants,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal from the Court of Appeal of the State of California, First Appellate District, Division Four

JURISDICTIONAL STATEMENT

Appellamts appeal from that portion of the judgment of the Court of Appeal of the State of California, First Appellate District, Division Four, upholding California

Insurance Code §§685-685.4 against the contention that the said statute violates the equal protection clause of the Fourteenth Amendment to the United States Constitution and violates the commerce clause of the United States Constitution. This judgment affirms the judgment of the Superior Court of the City and County of San Francisco in Action No. 518994. The California Supreme Court denied our petition for hearing. Said judgment of the Court of Appeal of the State of California was entered on 30 November 1967, the date the California Supreme Court denied a hearing; said judgment was filed in the Court of Appeal on 5 October 1967.

Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Court of Appeal is reported in 255 Adv. Cal. App. 8, 62 Cal. Rptr. 784, ____ Pac. 2d ____. It is attached hereto as Appendix A. The findings of fact, conclusions of law, and judgment of the Superior Court of the City and County of San Francisco in Action No. 518994 (affirmed by the Court of Appeal) are not reported and are attached hereto as Appendix B.

JURISDICTION

This suit was brought by eighteen Texas fire and casualty insurers under California Revenue and Taxation Code §13102 for recovery of retaliatory taxes imposed by the State of California under the authority of California

Insurance Code §§685-685.4 for the years 1959 and 1960. Recovery was sought on the ground that said sections are unconstitutional and void because in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution and of the commerce clause of the United States Constitution. The judgment of the Court of Appeal of the State of California upholding said statute against the contention that it violated the United States Constitution in the particulars mentioned was entered on 30 November 1967, the date the California Supreme Court denied a hearing; (said judgment was filed in the Court of Appeal on 5 October 1967). Notice of Appeal was filed in the Court of Appeal on 19 January 1968. The jurisdiction of the Supreme Court to review this decision is conferred by Title 28, United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment in this case: *Wheeling Steel Corp v Glander* (1949) 337 US 562; *Reserve Life Ins Co v Bowers* (1965) 380 US 258; *Hanover Fire Ins Co v Carr* (1926) 272 US 494; *Southern Railway Co v Greene* (1910) 216 US 400.

QUESTIONS PRESENTED

1. Whether some foreign (out of state) insurance companies, admitted unconditionally to a state, may subsequently be discriminated against, in comparison with domestic and other foreign insurers, by imposition of a retaliatory tax not imposed on domestic or all foreign insurers. That is to say: whether California may impose a retaliatory tax on some foreign insurers unconditionally admitted to transact insurance in California at a time

when no such tax statute existed; or whether imposition of such tax denies such foreign insurers equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution.

2. Whether a discriminatory retaliatory tax imposed only on some foreign insurance companies and not on domestic or all foreign insurance companies is a violation of the commerce clause of the United States Constitution.

STATUTES INVOLVED

California Insurance Code §§685, 685.1, 685.2, 685.3, and 685.4 (Stats 1959 Ch 2120 §1 pp. 4945-4946) are set forth in Appendix C hereto.

STATEMENT

Appellants are eighteen Texas fire and casualty insurers admitted to transact insurance in California and engaged in interstate commerce. Ten of the companies were admitted to California between 1945 and 1959, during which period California did not impose a retaliatory tax, and they obtained unequivocal licenses to do business in California, as distinguished from a year to year admission to the state. All appellants were admitted to California prior to passage of the 1959 retaliatory law.

Appellants paid $634,000 gross premiums tax to California for 1959 and $685,000 for 1960. The gross premiums tax was imposed on both domestic and foreign insurers uniformly. In addition, appellants paid California $460,000 retaliatory tax for 1959 (out of a total of

$717,000 in retaliatory taxes imposed on insurers from all states outside California doing business in California, or 64% of all retaliatory taxes imposed by California) and a comparable figure for 1960. California insurers and insurers of many other states did not pay California any retaliatory tax.

As to all appellants, the imposition of a retaliatory tax not imposed on domestic and all foreign insurers constituted a denial of equal protection in violation of the Fourteenth Amendment to the United States Constitution; and the retaliatory tax discriminated against certain foreign insurers and in favor of domestic and other foreign insurers and unreasonably burdened interstate commerce and constituted a violation of the commerce clause of the United States Constitution.

How the Federal Questions Are Presented. Appellants filed suit against appellee in the Superior Court of the City and County of San Francisco, Action No. 518994. The complaint alleged that the statute under which the tax was assessed is unconstitutional in that it violates the Fourteenth Amendment to the United States Constitution [Document No. 8 of Record on Appeal, at p. 101, lines 20-24]. Plaintiffs' and defendant's exhibit 1-A in the trial court, at p.33 lines 21-29 [Document No. 11 of Record on Appeal], states that appellants contend that California Insurance Code §§685 through 685.4 are unconstitutional because in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution and the commerce clause of the United States Constitution. The trial court found as a conclusion of law (conclusion of law III) on which it based its judgment:

> "The retaliatory law, comprising sections 685-685.4, was and is valid . . . The said retaliatory law is neither in violation of Article I, §8, Clause 3, of the United States Constitution [commerce clause], nor of the equal protection nor due process clauses of the 14th Amendment to that Constitution. . ." [Appendix B p. xxiv]

Appellants raised these constitutional points in their briefs on appeal to the California Court of Appeal. The Court of Appeal, whose judgment is now before this Court, passed upon and rejected these points. It devoted more than seven pages of its twenty-four page opinion to the equal protection and commerce clause points [Appendix A, pp. xii-xviii]. The points were again raised by appellants in their petition for hearing in the California Supreme Court, at the top of p.3 [Document No. 5 of Record on Appeal, at p.43], but the California Supreme Court denied a hearing (without opinion).

THE QUESTIONS ARE SUBSTANTIAL

The questions presented herein are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for the reasons hereinafter stated.

In *Ozark Butane Co Inc v Oklahoma Liquefied Petroleum Gas Board, et al* (1964) 369 US 885, in a case involving many of the same issues as the case at bar, this Court stated: "Probable jurisdiction is noted and the case is placed on the summary calendar." The decision below in which a three-judge United States District Court for the Western District of Oklahoma upheld retaliatory legislation is reported at 235 Fed Supp 406 (DC WD Okla

1964). On 2 March 1965 the appeal was dismissed by stipulation under Rule 60. (380 US 928.) In checking with counsel for appellant we are informed that appellant was bought out while the appeal was pending which made the appeal moot. This case, however, indicates that this Court felt in 1964 that the issues in this case merited review.

In *Fire Association of Philadelphia v New York* (1886) 119 US 110 this Court upheld a retaliatory tax, but only because the foreign insurer had only a one year license *subject to annual renewal*; the Court stated that as a condition of renewal a discriminatory tax could be imposed. In *Prudential Ins Co v Hobbs* (1946) 328 US 823 [same case below, 160 Kan 300, 161 Pac.2d 726 (1934)] a retaliatory tax was upheld, but again the tax law had been in effect since 1871 and it was being applied to foreign companies seeking admission *after* that date. These cases follow the rule that a state may exclude a foreign corporation entirely or it may admit it subject to conditions which may be discriminatory. Two other cases supporting the same principle but involving the gross premiums tax rather than a retaliatory tax are *Lincoln National Life Ins Co v Read* (1945) 325 US 673 and *Prudential Ins Co v Benjamin* (1946) 328 US 408.

At the same time, however, this Court has consistently held that once a foreign corporation has been admitted to a state unconditionally, it may not later be discriminated against by a higher rate of taxation or the imposition of additional burdens not imposed on domestic corporations. The leading cases for this proposition are *Hanover Fire Ins Co v Carr* (1926) 272 US 494, *Southern Railway Company v Greene* (1910) 216 US 400, and more

recently *Wheeling Steel Corp v Glander* (1949) 337 US 562 and *Reserve Life Ins Co v Bowers* (1965) 380 US 258. Compare *State Board of Ins v Todd Shipyards* (1962) 370 US 451. See also *Connecticut General Life Ins Co v Johnson* (1938) 303 US 77, where an unsuccessful attempt was made to impose a tax against a foreign insurer which had been doing business in the state for many years. The decision below in the case at bar is in conflict with *Hanover* and the other cases cited in this paragraph.

The California Court of Appeal in its opinion concedes that appellants obtained certificates of authority to transact insurance "for an indefinite period" [Appendix A, p. xvi]. The opinion states:

> *"Unlike insurers who must obtain an annual license to conduct business, appellants appear to have obtained 'unequivocal' licenses to do business.* The fact that the California certificates of authority could be revoked for failure to pay taxes or to otherwise comply with the law (Ins. Code §701) does not alter that position. Hanover Fire Ins. Co. v. Harding, supra, 272 U.S. 494, is said to stand for the proposition that once a foreign corporation has been unconditionally admitted to do business in a state it must be granted equal protection. (272 U.S. at p. 514 [71 L.Ed. at p. 382].) *We conclude that appellants here are entitled to equal protection. . . .*" (emphasis added) [Appendix A, p. xvi]

The California Court of Appeal then notes that ten of appellants were admitted to the state at a time when there was no retaliatory law. (As noted above, all appellants were admitted prior to the passage of the law in question.) The court concludes, nevertheless, that equal protection has not been denied appellants.

Retaliatory laws are a matter of great public interest and importance since they are discriminatory in nature, and because most states have such laws. They place a substantial burden on interstate commerce and are in the nature of tariffs. Professor Patterson in his classic work "The Insurance Commissioner in the United States" (1927) at p. 107 states:

> "It may be confidently asserted that they [retaliatory statutes] were passed at the instigation of domestic insurers, for the purpose of erecting a sort of tariff wall around the state; and that they [retaliatory statutes] did not benefit the insuring public, however much they may have increased the state's revenues."

Appellants here, however, are not making a general attack against retaliatory laws as such but only against such laws when and to the extent that they discriminate against foreign companies which have already been unconditionally admitted to a state prior to passage of the law.

Dated:
16 February 1968.

Respectfully submitted,
BERT W. LEVIT
VICTOR B. LEVIT
Counsel for Appellants

Of Counsel
LONG & LEVIT

(Appendices A, B and C Follow)

Appendix A

In the Court of Appeal
State of California
First Appellate District

DIVISION FOUR

1 Civil No. 23,675

Atlantic Insurance Co., et al.,
Plaintiffs and Appellants,
vs.
State Board of Equalization of the State of California,
Defendant and Respondent.

OPINION

Plaintiffs, who are 18 Texas fire and casualty insurance companies, appeal from a judgment denying recovery of retaliatory taxes in the aggregate amount of $929,833.42 imposed on them for the years 1959 and 1960. The levy had been made by respondent Board of Equalization, pursuant to Insurance Code section 685 et seq., upon the Board's determination that the insurance tax laws of the State of Texas discriminate against California-based insurance companies and hence, under the California statute, call for a retaliatory levy.

Almost every state imposes some kind of retaliatory tax upon insurance companies domiciled in any other state which does not extend reciprocity of tax treatment to out-of-state insurance companies. (See Pelletier, *Insurance Retaliatory Laws* (1964) 39 Notre Dame Law. 243, for a survey of these statutes.) The Constitution of California has for many years authorized retaliatory taxation of foreign insurance companies (art. XIII, § 14-4/5, subd. (f)(3)) and legislation providing for such levies has been in effect since 1873. (Stats. 1873, ch. 610, § 18.) The common purpose of such legislation in the several states has been to discourage any state from imposing discriminatory taxes or other burdens upon out-of-state companies. The effort seems to have been very largely successful; in any event taxes on insurance premiums have stayed close to 2 per cent in most states, for both domestic and out-of-state insurers. (39 Notre Dame Law., *supra,* at 247.)

This situation of equilibrium was disturbed when the United States Supreme Court in *United States v. South-Eastern Underwriters Assn.* (1944) 322 U.S. 533, held that the business of insurance could be the subject of interstate commerce. The decision was believed to invalidate retaliatory taxation (4 Assembly Interim Comm. Reports on Revenue & Taxation (1964) No. 15, p. 59) and the California Legislature the following year repealed[1] Insurance Code sections 1560 and 1561, the implementing legislation which was then in effect. This action was too hasty; Congress the same year enacted the McCarran-Ferguson Act (59 Stat. 33; 15 U.S.C., §§ 1011-1015) returning to the states authority to regulate and tax the

[1]Stats. 1945, ch. 921.

insurance industry. (Also see *Prudential Ins. Co. v. Benjamin* (1946) 328 U.S. 408.)

The California constitutional provision authorizing the imposition of retaliatory taxes had remained in effect, but it was not self-executing. Accordingly, in 1959 the Legislature enacted Insurance Code section 685 et seq., imposing retaliatory taxes upon foreign insurance companies whose home states impose taxes on similar California companies that are higher than California's levies upon those states' companies.[2] A troublesome difficulty emerged: article XIII, section 14-4/5, subdivision (f)(3) of the Constitution at that time authorized retaliatory taxation only when the foreign state imposed upon California insurers burdens exceeding those which it imposed upon its domestic insurers, whereas Insurance Code section 685 pur-

---

[2]"When by or pursuant to the laws of any other state or foreign country any taxes, licenses and other fees, in the aggregate, and any fines, penalties, deposit requirements or other material obligations, prohibitions of restrictions are or would be imposed upon California insurers, or upon the agents or representatives of such insurers, which are in excess of such taxes, licenses and other fees, in the aggregate, or which are in excess of the fines, penalties, deposit requirements or other obligations, prohibitions or restrictions directly imposed upon similar insurers, or upon the agents or representatives of such insurers, of such other state or country under the statutes of this State, so long as such laws of such other state or country continue in force or are so applied, the same taxes, licenses and other fees, in the aggregate, or fines, penalties or deposit requirements or other material obligations, prohibitions, or restrictions, of whatever kind shall be imposed upon the insurers, or upon the agents or representatives of such insurers, of such other state or country doing business or seeking to do business in California. Any tax, license or other fee or other obligation imposed by any city, county, or other political subdivision or agency of such other state or country on California insurers or their agents or representatives shall be deemed to be imposed by such state or country within the meaning of this article." (Ins. Code, § 685.)

ported to require retaliation by California whenever a foreign state charged California companies more than California charged the companies of that state. The type of retaliatory tax contemplated by the California constitutional provision may be termed a *discriminatory* tax while the tax imposed by the legislation is of a type known as a *comparative* retaliatory tax. In *Franklin Life Ins. Co. v. State Board of Equalization* (1965) 63 Cal.2d 222, the Supreme Court held (adopting a position already taken by the Attorney General in 35 Ops.Cal.Atty.Gen. 182) that although the new statute would be unconstitutional if applied to a case where the discrimination contemplated by article XIII, section 14-4/5, subdivision (f) (3), is not present, no constitutional defect exists in any case which meets both the discriminatory test of the constitutional provision and the comparative test of Insurance Code section 685. (63 Cal.2d 222, 227.)

By an amendment adopted November 3, 1964, Constitution article XIII, section 14-4/5, subdivision (f)(3), was made to conform to the "comparative" test of Insurance Code section 685. Thus the *Franklin Life* problem will not be seen in future cases. However, during the years 1959 and 1960 which we are concerned with in the present appeal, the *Franklin Life* approach was still required. We must therefore rule upon appellants' attack on the trial court's determinations that Texas law discriminates against California insurers doing business in Texas and that the burdens placed by Texas upon California insurers doing business in Texas are greater than the burdens placed by California upon Texas insurers doing business in California. Appellants also contend that the California

statute violates the commerce and equal protection clauses of the U. S. Constitution and that in any event the tax imposed in this case was erroneously computed.

The facts are not disputed; the parties cooperated in submitting to the trial court detailed stipulations which incorporated extensive documentary exhibits. These stipulations were adopted by the court in its findings of fact.

California's gross premiums tax rate is 2.35 per cent. (Cal.Const., art. XIII, § 14-4/5, subd. (d).) Texas imposes a tax of 3.85 per cent on the gross premiums of all fire and casualty insurers from policies written on property or risks located in Texas. (Tex. Rev. Civ. Stat., art. 7064.) But the rate may be reduced to as little as 1.1 per cent, depending on the company's rate of investment in Texas securities, as defined in the statute. The company is to determine the amount it has invested in the state in which it has the highest percentage of its admitted assets invested. Then it calculates the relationship, as a percentage, between the value of its Texas securities and the amount invested in securities of the state of its highest investment. That percentage determines the rate of the company's gross premium tax according to the following scale:

Percentage of Texas securities to securities in state of highest investment	Texas Gross Premiums Tax
less than 75%	3.85 %
75 – 80 %	3.025%
80 – 85	2.75
85 – 88	2.2
88 – 90	1.65
over 90	1.1

For example, assume that a California insurer has $100,000 invested in California, $75,000 in Oregon, and $80,000 in Texas. Its highest percentage of investment is in California. Therefore, it calculates that its Texas securities are 80 per cent of its securities in the state of highest investment. The Texas tax rate is then 2.75 per cent. That comparatively unfavorable rate would be applied even if a disproportionately smaller share of the insurer's premium revenue came from Texas business.

The evidence established that Texas investments of the type considered good and prudent investments for California fire and casualty companies were available at all times since 1957. Texas municipal bonds, for instance, are widely held by Texas and non-Texas insurers.

Evidence was received showing the actual effect of the statutory scheme in the year 1960 for premiums earned in 1959. All insurers domiciled in Texas paid at the minimum rate of 1.1 per cent. Only 26 of the 458 foreign insurers which did business in Texas paid at the 1.1 per cent rate and a total of only 39 paid at any rate below the maximum. Only 9 per cent of all California insurers doing business in Texas in the years 1959 and 1960 qualified for any rate below the maximum. Upon this evidence the trial court concluded, adopting the view expressed earlier by the Attorney General (39 Ops.Cal.Atty.Gen., 98), that California insurers doing business in Texas were subjected to both discrimination and comparative disadvantage and that a retaliatory levy was called for by Insurance Code section 685.

Does Texas Law Discriminate?

Appellants contend that the Texas statute is not discriminatory because the scale of gross premium tax rates merely compensates for state and federal taxes paid on Texas investments. It is argued that all insurers therefore pay the equivalent of the maximum rate and that if Texas did not attempt so to equalize tax burdens there would be a greater burden placed upon insurers owning Texas securities. Consistent with this theory, a Texas court has held for purposes of applying the Texas retaliatory statute that the normal Texas rate must be calculated at the maximum provided in the schedule because payment at the lower rates plus taxes on Texas investments equals payment at the maximum rate. *(Board of Insurance Com'rs v. Prudential Fire Ins. Co.* (Ct.Civ.Apls. of Texas, 1942), 167 S.W.2d 578, 579.) But the Texas courts have recognized that the purpose of the statute is to provide a market for securities issued by Texas governmental entities. *(Ibid; Kansas City Title Ins. Co. v. Butler* (Ct. Civ.Apls. of Texas, 1952) 253 S.W.2d 318, 320, 321.) No evidence was presented in the present case of any actual relationship between the gross premiums rate schedule and other taxes levied upon the holders of Texas securities.

The evidence reviewed above demonstrates the discriminatory effect of the Texas statute. The reason so few non-Texas insurers have qualified for favorable treatment is clear: the requirements of the schedule bear no relationship to the volume of the insurer's Texas business. It was justly observed by the Attorney General (39 Ops. Cal.Atty.Gen., *supra,* at 100) that "Consequently the

'Texas securities' investments standard represents no problem to Texas companies, and conversely, a major problem to foreign companies." It is natural for an insurance company to hold a major proportion of its assets in the state of domicile. Yet the Supreme Court of Minnesota said in *Republic Insurance Co. v. Commissioner of Taxation* (1965) 272 Minn. 325, 138 N.W.2d 776, 782: "By following the described investment policy in their home states foreign companies operating in Texas ultimately are subject to a tax rate for Texas business about three times that imposed on a domestic company."

We should point out in passing that in determining whether Texas "discriminates" against out-of-state insurers we are not referring to discrimination amounting to a denial of equal protection under the Fourteenth Amendment to the Constitution of the United States. Article XIII, section 14-4/5, subdivision (f)(3), of the Constitution of California speaks of *obligations* imposed upon California insurers domiciled in the foreign state. Thus the term "discrimination" means in this context "excess obligations."

Appellants' argument that the Texas schedule of rates merely attempts to compensate for other burdens upon the holders of Texas securities disregards the fact that the schedule provides for no relationship whatever between Texas-earned premiums and taxes thereon, on the one hand, and Texas assets and taxes thereon, on the other hand. The fictional character of the equalization argument is further demonstrated by the fact that a foreign insurer which attains only the 74 per cent mark on its Texas securities receives absolutely no "equalization."

Appellants next contend that any discrimination in the operation of the Texas law results from the investment decisions of the insurance companies, citing *Franklin Life Ins. Co. v. State Board of Equalization* (1965) 63 Cal. 2d 222, 233. There the California Supreme Court held that the California retaliatory statute did not deny equal protection even though the principal place of business deduction[3] so reduced the California tax burden on small companies with a low volume of business that the foreign burden was greater than the California burden, with the effect that the retaliatory tax applied to small, but not large, insurers. The court held that the statute does not by its terms discriminate as to the size of the insurer and that discrimination does not necessarily follow from the terms of the statute. After determining that there was no discrimination under the equal protection clause, the court added: "Any possible discrimination in operation is attributable to the Company's investment decision with regard to its principal place of business." (63 Cal.2d at 233.) Even if this dictum were to be applied to the present case, the greater Texas burden necessarily flows from the terms of the Texas statute itself.

It is argued by appellants that a series of letters exchanged in 1944 by the California Insurance Commissioner and the chairman of the Texas Board of Insurance constitutes an administrative determination that Texas law does not discriminate. These letters dealt with certain details in the construction of Texas Revised Civil Statutes, articles 7064 and 7064a. The California Commissioner concluded that since it was doubtful whether the

[3]Cal.Const., art. XIII, § 14-4/5, subd. (e).

Texas taxes in question were taxes upon the franchise of transacting specific lines of insurance or upon insurance generally, "we have concluded that in the case of Texas insurers transacting fire insurance in California, the *discriminatory* tax provisions of Article 7064a of your statute do not call for the application of our retaliatory law." (Emphasis added.) Because of this doubt strict construction of the California retaliatory tax law prevented application of the tax. *(Bankers Life Co. v. Richardson* (1923) 192 Cal. 113.) Thus there was no determination that the Texas tax was nondiscriminatory. Furthermore, at the time of the correspondence California law did not permit fire insurers to issue health or accident insurance. Texas law permitted it. From this difference, doubt arose as to the applicability of the Texas statute. Subsequently, California law has been changed to permit the admission of an insurer for all classes of insurance. (Ins. Code, § 700.01, added by Stats. 1947, ch. 1070, § 1, p. 2471.) Hence, the correspondence would be obsolete even if it had constituted an administrative decision of non-discrimination. We conclude that Texas law does discriminate against California insurers.

Does Texas Law Impose Comparative Disadvantage?

Appellants argue that, since all of them qualify for the minimum Texas rate by virtue of their holdings of Texas securities, a similar California insurer doing business in Texas would hold the same amount of Texas securities and would therefore also qualify for the minimum Texas rate. Thus in comparing the Texas burden upon a California insurer, and the California burden on a Texas in-

surer, a Texas rate of 1.1 per cent is to be used to compute the Texas burden and a California rate of 2.35 per cent is to be used to compute the California burden. As a result of this comparison, appellants claim that the Texas burden is lower and that Insurance Code section 685 therefore cannot be applied to them. The language of section 685 does not suggest so extraordinary a construction of the term "similar insurers." Moreover, the decisions which have considered the method to be employed in making interstate comparisons do not support appellants' contention. In the single California case which deals with the problem, *Bankers Life Co. v. Richardson, supra,* 192 Cal. 113, 124, the Supreme Court held (in that instance to the benefit of the foreign insurer) that the retaliating jurisdiction should make a levy "sufficient to make the total equal to the amount that would be realized were the rule of taxation of the foreign state, under whose laws the foreign company was organized, applied to such foreign company's business" transacted in the retaliating state. (*Cochrane v. Bankers' Life Co.* (8th Cir. 1929) 30 F.2d 918, 922; also see *Life & Casualty Ins. Co. v. Coleman* (Ct. of Apls. of Ky. 1930) 25 S.W.2d 748, 751.)

The Supreme Court of Kansas in construing the application to a Texas insurer of the Kansas retaliatory statute, which is substantially identical to Insurance Code section 685, held that the proper method of determining the Texas burden is to inquire "what amount of taxes . . . would a Kansas company, similar to the Texas company, be required to pay to the state of Texas, if it operated in that state under the same conditions that the Texas

company operated in Kansas, that is, without the Kansas company having invested any of its assets in Texas securities?'' *(Employers Casualty Co. v. Hobbs* (1940) 152 Kan. 815, 817 [107 Pac.2d 715].) Of course, the maximum Texas rate of 3.25 per cent would apply and the Kansas court held that retaliation was called for. (Also see *Republic Ins. Co. v. Commissioner of Taxation, supra,* 272 Minn. 325 [138 N.W.2d 776]; *Kansas City Life Ins. Co. v. State* (1953) 265 Wis. 414 [61 N.W.2d 816]; *Occidental Life Ins. Co. v. Holmes* (1938) 107 Mont. 48 [80 Pac.2d 383].)

We have concluded that the trial court was correct in determining that the proper comparison is between the impact of the Texas tax upon a Texas insurer owning Texas securities and the impact of the same tax on a California insurer owning California securities; that is to say, the Texas taxing formula is to be applied to a California set of facts in determining whether the Texas statute imposes excess burdens upon ''similar insurers'' as contemplated by Insurance Code section 685.

We now consider appellants' contentions that the California statute violates the commerce and equal protection clauses of the U. S. Constitution.

The Commerce Clause

In 1869 the United States Supreme Court held that insurance was not interstate commerce under article I, section 8, clause 3, of the United States Constitution. Thus the business of insurance was subject to state regulation. *(Paul v. Virginia,* 75 U.S. 168, 183.) But in 1944, the court held in *United States v. South-Eastern Underwriters*

Assn., supra, that interstate insurance activity was commerce falling within the Sherman Anti-Trust Act. To settle resulting questions regarding the states' powers to tax and regulate the business of insurance, Congress enacted the McCarran-Ferguson Act the following year. (59 Stats. 33; 15 U.S.C., §§ 1011-1015.) The new statute provided in section 2, subdivision (a), that "the business of insurance . . . shall be subject to the laws of the several states which relate to the regulation or taxation of such business." The first decision interpreting the McCarran Act, *Prudential Ins. Co. v. Benjamin, supra,* 328 U.S. 408, 429-430, declared that the congressional purpose was to give effect to then existing and future systems of state taxation and regulation of insurance. The court determined that, since Congress must have been aware that such existing systems displayed many variations, it must have been intended to permit such variations to exist and to be extended. The court did not conclude that Congress validated every existing state regulation on tax, observing that "there can be no inference that Congress intended to circumvent constitutional limitations upon its own power." (328 U.S. at 430.) The court held, however, that Congress "clearly put the full weight of its power behind existing and future state legislation to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it, . . ." (328 U.S. 431.) The *Benjamin* decision was followed by another, *Prudential Ins. Co. of Amer. v. Hobbs* (1946) 328 U.S. 822 *(per curiam),* which disposes of appellants' commerce clause contention. There the court affirmed *In re Insurance Tax Cases* (1945) 160 Kan. 300 [161 Pac.2d

726], citing *Benjamin, supra,* and *Robertson v. California* (1946) 328 U.S. 440. The Kansas Supreme Court had upheld, over commerce clause objections, both the Kansas primary tax and retaliatory tax on foreign insurers. (161 Pac.2d at 734; see id. at 730 for the Kansas retaliatory law, Kan. G.S. 1935, 40-253.) The Kansas court held that the taxes in question placed no unreasonable burden on the interstate commerce of the insurers. (161 Pac.2d at 734.) The court concluded that, since the questioned taxes had been held to be valid before *United States v. South-Eastern Underwriters Assn., supra,* 322 U.S. 533, and since the McCarran Act left regulation of insurance to the states, *South-Eastern* could not invalidate the challenged Kansas statutes. (161 Pac.2d at 735.) Since the Supreme Court of the United States affirmed this decision under the authority of *Benjamin, supra,* we take it as settled that retaliatory legislation of the character here under consideration is not vulnerable to attack under the commerce clause. (See Pelletier, op.cit.*supra,* at 248-251.)

The Equal Protection Clause

In *Lincoln Life Ins. Co. v. Read* (1945) 325 U.S. 673, 675, the United States Supreme Court upheld, over equal protection objections, an Oklahoma tax on foreign insurers where there was no tax imposed on domestic insurers. The Oklahoma statute required foreign insurers to obtain an annual license to conduct business in Oklahoma. No license could be granted until the applicant complied with Oklahoma laws and agreed to pay all taxes which might be imposed, at any time, on foreign insurers. At the time the insurers first qualified to do business in

Oklahoma, a 2 per cent tax was imposed on premiums collected in Oklahoma. Later the tax was increased to 4 per cent. No similar tax was imposed on domestic insurers. The court distinguished cases such as *Hanover Ins. Co. v. Harding* (1926) 272 U.S. 494, on the ground that there the insurer was subjected to discriminatory taxation after having obtained an unequivocal license to do business in the taxing state. In *Lincoln* payment of the tax was imposed as a condition precedent to the issuance of a license for the following year. The court held that "the equal protection clause does not require the tax or rate of tax exacted from a foreign corporation as a condition of entry to be the same as that imposed on domestic corporations." (325 U.S. at 678.) Thus Oklahoma could impose a tax, or increase the rate of tax on a foreign insurer, as a condition precedent to admission into the state to do business. Put more concisely, a foreign corporation is not a "person within [a state's] jurisdiction" entitled to equal protection until it complies with such conditions precedent. (See 73 Harv.L.Rev. (1960) 1595, 1608.)

Lincoln partially relied on *Philadelphia Fire Association v. New York* (1886) 119 U.S. 110, in which a retaliatory tax was upheld over equal protection objections. As in *Lincoln*, however, payment of the tax was a condition precedent to obtaining a renewed annual license. The court stated, at page 119, that "The State, having the power to exclude entirely, has the power to change the conditions of admission at any time, for the future, and to impose as a condition the payment of a new tax, or a further tax, as a license fee." Until such fees are paid

the insurer is not within the jurisdiction of the state. As in *Lincoln,* a lower tax existed at the time of initial admission and the action was precipitated by a subsequent raising of the tax. (119 U.S. at 119-120.)

In the present case appellants point out that California, unlike most states, grants certificates of authority to transact insurance business for an indefinite period, subject to payment of a $10 annual fee. (Ins. Code, § 701, § 705 as amended by Stats. 1963, ch. 1917, § 1.) A certificate is not granted until the applicant conforms to requirements of California law prerequisite to its issue. After such issue the insurer must continue to comply with requirements of law. (Ins. Code, § 700.)

Unlike insurers who must obtain an annual license to conduct business, appellants appear to have obtained "unequivocal" licenses to do business. The fact that the California certificates of authority could be revoked for failure to pay taxes or to otherwise comply with the law (Ins. Code, § 701) does not alter that position. *Hanover Ins. Co. v. Harding, supra,* 272 U.S. 494, is said to stand for the proposition that once a foreign corporation has been unconditionally admitted to do business in a state it must be granted equal protection. (272 U.S. at 514.) We conclude that appellants here are entitled to equal protection. (See *Connecticut General Life Co. v. Johnson* (1938) 303 U.S. 77, holding that foreign insurers are entitled to due process in California.)

It was proved that ten of the appellants were admitted to transact insurance business prior to the enactment of Insurance Code section 685. Therefore it is contended under the authorities just reviewed that the retaliatory tax

has been applied unconstitutionally to those ten appellants. We observe first that the California Supreme Court dealt with the equal protection issue in the *Franklin Life* case, *supra*. In rejecting the contention that the California retaliatory tax denies equal protection, the court stated: "The United States Supreme Court . . . has long recognized the elementary principle that a distinction in tax statutes between parties does not violate the equal protection clause if such distinction rests upon a rational basis. That court has said, 'Neither due process nor equal protection imposes upon a state any rigid rule of the equality of taxation. . . . A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it.' [Citations.]" (63 Cal.2d at 232-233.)

The court then held that no discrimination necessarily results from the terms of the statute. Of course the court was specifically considering possible discrimination based on the size of the insurer. But in rejecting this specific attack, the court implicitly rejected the general attack presented by appellants here. We are bound to follow that holding.

Except for *Franklin*, we have found no case dealing directly with the question whether insurance retaliation statutes discriminate on the basis of a reasonable classification. (But see Pelletier, op.cit.*supra*, at 249, fn. 21.) *Hanover Ins. Co. v. Harding, supra*, 272 U.S. 494, 514-516, merely held that a primary tax on premiums cannot be

imposed on foreign insurers at a grossly higher rate than on domestic insurers. A franchise tax dependent on a foreign-domestic distinction alone is not a reasonable classification where both classes of corporation carry on essentially the same type of business. (*Southern Railway Co. v. Greene* (1910) 216 U.S. 400, 417-418.) But here the purpose of the retaliatory law is to secure reciprocity. (*Bankers Life Co. v. Richardson, supra,* 192 Cal. 113, 124.) It is designed to achieve uniformity of treatment and not to discriminate. In view of the relative uniformity of insurance taxation in the several states, the California law seems reasonably designed to accomplish its purpose. Therefore we hold that for purposes of this tax foreign insurers are classified separately on a rational basis and that there was no denial of equal protection.

Computation of the Tax

Appellants assert two errors in computation of the tax. First, sums paid by appellants to the Pacific Fire Rating Bureau were not added to the California burden for comparative purposes. But California law did not require that appellants employ a rating service. The Insurance Code only requires that rates be adequate, non-discriminatory and not excessive. (Ins. Code, § 1852.) The state does not establish rates. Texas law, on the other hand, imposes a special tax to finance the rate-regulating function of the Board of Insurance Commissioners. (Tex. Ins. Code, arts. 5.24, 5.29.) Appellants contend that as a practical necessity foreign insurers must utilize a rating service to avoid charging excessive, inadequate or discriminatory rates. But the Texas tax for rating is imposed by the laws of

Texas, whereas payments to the Pacific Fire Rating Bureau are not "obligations . . . directly imposed on similar insurers . . . under the statutes of this State, . . ."

Finally, appellants point out that Insurance Code section 685.1 provides that the retaliatory tax does not apply to "special purpose obligations or assessments heretofore imposed by another state or foreign country in connection with particular kinds of insurance, other than property insurance; . . ." By Texas law, a special additional tax is imposed on premiums from motor vehicle insurance. (Tex. Ins. Code, art. 5.12.) This tax, at a rate of one-fifth of one per cent, is used to administer the motor vehicle provisions of the Texas code. Appellants claim that the Texas levy relates to liability, not property, insurance. The trial court upheld respondent's claims that it relates to property insurance and is not exempt from retaliation. Neither the Texas nor California insurance codes defines property insurance. But Texas Insurance Code article 5.01 defines motor vehicle insurance as follows: "Motor vehicle or automobile insurance . . . shall be taken and construed to mean every form of insurance on any automobile . . . or necessitated by reason of the liability imposed by law for damages arising out of ownership, operation, maintenance, or use in this State of any automobile. . . ."

Respondent contends that since this definition includes collision, fire, theft, and comprehensive coverage, and since appellants have not segregated these property coverages from liability coverage, strict construction of the exemption established by section 685.1 prevents consideration of taxes paid pursuant to Texas Insurance Code article 5.12.

The California Insurance Code defines liability insurance: "§108 Liability. Liability insurance includes: (a) Insurance against loss resulting from liability for injury, fatal or nonfatal, suffered by any natural person, or resulting from liability for damage to property, or property interests of others but does not include workmen's compensation, common carrier liability, boiler and machinery, or team and vehicle insurance." (Stats. 1953, ch. 1489, §1, p. 3100.) Subdivision (b) of that section expressly includes certain disability, funeral and accidental death benefits "in the case of an automobile liability policy . . . when issued with or supplemental to the insurance defined in subdivision (a); . . ." (Stats. 1957, ch. 550, §1, p. 1644; amended by Stats. 1959, ch. 328, §1, p. 2255; amended by Stats. 1965, ch. 1557, §1, p. 3649.) The 1965 amendment, *supra,* added a second paragraph to subdvision (b) to broaden automobile liability coverage still further. The subdivision now includes disability insurance covering members of the insured's household and others named in the policy and other forms of disability insurance. Insurance Code section 116 defines automobile insurance as including insurance of automobile owners and others "against hazards incident to ownership, maintenance, operation and use of automobiles, other than loss resulting from accident or physical injury, fatal or nonfatal, to, or death of, any natural person." Finally the Vehicle Code, section 16456, speaks of a "motor vehicle liability policy" as covering the insured in the operation of vehicles registered in his name.

Examination of these statutes shows that protection against injury to other persons or their property is clearly

liability insurance. These injuries arise from the "operation of vehicles." It is not clear, however, that collision, fire, theft, and comprehensive protection is liability insurance. Thus, motor vehicle insurance may combine both forms, liability and property. In this ambivalent situation we resort to the principle that the retaliatory law must be "strictly construed, executed with care, and not applied to any case that does not fall plainly within the letter of the law." (*Bankers Life Co. v. Richardson, supra,* 192 Cal. 113, 124.) Since motor vehicle insurance is not clearly property insurance, it "does not fall plainly within the letter of the law" and, therefore, the retaliatory tax can not be applied to assessments levied pursuant to Texas Insurance Code article 5.12. The rule of strict construction is for the benefit of the taxpayer, not the state.

We therefore conclude that the judgment must be modified by augmenting the schedule of recovery consented to in the trial court by respondent, so as to include appropriate sums to reimburse each appellant for the additional tax on premiums from motor vehicle insurance imposed by Texas Insurance Code article 5.12. The cause is remanded to the trial court for determination of the amounts to be allowed. The trial court need not take further evidence unless it be so advised. As modified, the judgment is affirmed.

Christian, J.

We concur:
Devine, P.J.
Rattigan, J.

Filed October 5, 1967,
Lawrence R. Elkington, Clerk.

Appendix B

[Title of Court and Cause]

Filed January 26, 1966
Martin Mongan, Clerk
By R. W. Sotter, Deputy Clerk

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In this case the parties have filed a stipulation which sets forth many of the facts. Other facts are set forth in documents introduced in evidence pursuant to the terms of the stipulation.

FINDINGS OF FACT

This Court finds to be true the facts set forth in the stipulations filed or introduced as exhibits herein as follows:

1. A document entitled "Stipulation", introduced as Plaintiffs' and Defendant's Exhibit 1-A, June 9, 1964.

2. A document entitled "Stipulation in Lieu of Expert Testimony", introduced as Plaintiff's and Defendant's Exhibit 2-B, June 9, 1964.

3. A document entitled "Stipulation", filed in this action January 10, 1965.

4. Exhibits introduced in evidence pursuant to said stipulations.

(The foregoing documents are hereinafter referred to as the "stipulations".)

From such facts result the following conclusions of law which this Court makes and files:

CONCLUSIONS OF LAW

I

The State of Texas in its imposition, assessment and collection of charges for exercising the privilege of transacting insurance discriminates between property and casualty insurers incorporated or organized under the laws of the State of California on the one hand and property and casualty insurers incorporated or organized under the laws of the State of Texas on the other hand, with the result that the aggregate financial charges for the privilege of doing business in Texas made by Texas against similar California insurers doing business there, are greater than the aggregate financial charges for that privilege made by Texas against the Texas insurers which are the plaintiffs in this action.

II

In the process of computing the respective charges by way of tax, fees, assessments, etc., made by the States of California and Texas, the Insurance Commissioner did not err to the prejudice of plaintiffs or any of them by:

A. Not including, in computing the California charges for the purpose of retaliatory comparison, the amounts of current real estate taxes paid by the two plaintiffs who paid such taxes eligible for deduction under paragraph (e) of section 14 4/5 of Article XIII of the Constitution.

B. Excluding from the same computation amounts paid by plaintiffs to Pacific Fire Rating Bureau.

C. Assuming that a California property and casualty insurance company transacting insurance in Texas would

be required to pay the Texas premium tax at the rate of 3.85% in the absence of factors prescribed by Article 7064 of the Texas Insurance Code for reducing the rate of premium tax.

D. In determining the Texas charges, including certain maintenance assessments earmarked solely to defray the Texas Insurance Board's expense in enforcing the rating laws and annually adjusted to avoid such assessments exceeding such expense; except that any such assessments payable under Articles 5.24 and 5.68, Texas Insurance Code, and section 28 of Article 8306, Vernon's Annotated Texas Statutes, should be excluded if and when the amount thereof is determined. No evidence was presented during the trial of this case from which such amount can be so determined, but the parties have since stipulated to the amounts respectively set forth in paragraph VIII of these Conclusions of Law.

III

The retaliatory law, comprising sections 685-685.4, Insurance Code, was and is valid to the extent that its operation was permitted under paragraph (3) of subdivision (f) of section 14 4/5, Article XIII, California Constitution. All the assessments and collections of taxes and interest involved in this case were within that permissible scope of operation of said retaliatory law. The said retaliatory law is neither in violation of Article I, §8, Clause 3, of the United States Constitution, nor of the equal protection nor due process clauses of the 14th Amendment to that Constitution, nor of Section 13 of Article I of the California Constitution.

IV

In respect to the assessments and collections of taxes involved in this cause, the imposition thereof was proper, because during the period involved (1) by the laws of the State of Texas, taxes and obligations were imposed on insurers of the State of California doing business in the State of Texas in excess of those imposed upon insurers of the State of Texas doing business therein, and also (2) in excess of the normal taxes and obligations imposed by the laws of the State of California on insurers of the State of Texas doing business in this State, and (3) the taxes involved in this action represent the imposition on plaintiffs of the same obligations as are imposed by the State of Texas on California insurers doing business in that State.

V

In determining the California burden of obligations and charges upon Texas insurers for the purpose of making the comparison to determine, in the case of each plaintiff if a retaliatory assessment should be imposed, defendant computed the "normal" California tax under section 14 4/5 of Article XIII of the Constitution by multiplying the gross premiums received as therein specified by the specified rate, deducting from that product the amount of the real estate taxes, if any, eligible for such deduction under subdivision (e) of that section 14 4/5, and using the remainder after such deduction in such case as an element of the total charges comprising the California tax under that section. This was a valid and proper method of computation and made proper disposition of

the credit for real estate taxes paid in this State by the particular plaintiff, as indicated by Conclusion of Law No. II, paragraph A, supra.

VI

In comparing, for the purpose of determining whether and in what amount a retaliatory tax assessment should be made as to each plaintiff, the Texas tax on a Texas plaintiff with the Texas tax on a similar California insurer, defendant treated the Texas law as California law for that purpose, as indicated by the Conclusion of Law No. II, paragraph C, supra. Thus, the tax on the Texas plaintiff would be computed at 3.85% of the gross premiums received on *California* business if the amount of "California securities" owned by the plaintiff amounted to less than 75% of the securities invested in securities of the State in which that plaintiff had the greatest investment. This rate of tax would be decreased as the proportion of "California securities" so specified increased in the percentages prescribed by Article 7064 of the Texas Insurance Code for the corresponding decreases in Texas premium tax rates, until the decrease resulted in a minimum amounting to the total amount produced by the tax computed under section 14 4/5, Article XIII of the California Constitution. By "California securities" is meant securities issued in or so related to California as to constitute "similar securities" to "Texas securities" under Article 7064 of the Texas Insurance Code. The court concludes that this method of comparison was proper under the retaliatory law of California during the period involved.

VII

In computing California's total charges for purposes of retaliatory comparison, as to each plaintiff the amounts paid to the Pacific Fire Rating Bureau were excluded as indicated in Conclusion of Law No. II, paragraph B, supra. These payments are not imposed upon plaintiffs by the law of California. The exclusion was proper.

VIII

Section 685.1, Insurance Code, provides that the statutes on retaliatory insurance taxes "shall not apply as to special purpose obligations or assessments heretofore imposed by another state . . . in connection with particular kinds of insurance, other than property insurance." In the insurance industry "property insurance" is generally understood as meaning insurance against physical damage to property.

The stipulation of the parties contains conflicting allegations concerning the application of this part of the Texas tax law by the Commissioner in making the retaliatory computation. While page 19 of the stipulation, refers to these taxes as being payable under Article 5.24 of the Texas Insurance Code, statements on pages 20 and 28 attribute to the Commissioner the application of taxes payable under Articles 5.8, 5.12, 5.24 and 5.49 of the Texas Code, and section 28 of Article 8305 of Vernon's Annotated Texas Statutes. The retaliatory computation sheets filed by the respondent as part of Exhibit 2 indicate, in the case of each company, that the figures on page 19 of the stipulation include other maintenance taxes than those imposable under article 5.24 of the Texas Code.

Since by the terms of the California retaliatory law special assessments on "property insurance" are not excluded from the retaliatory computation, and the assessments under 5.12 (Motor Vehicle Insurance) and 5.49 (Fire and Allied Lines Insurance) are clearly "property insurance", it follows that the stipulation does not segregate these "maintenance" taxes as between "property insurance" and other types, so that there was in the evidence originally submitted no resolvable evidence before this Court as to the amount of any retaliatory computations which are excludable under section 685.1, Insurance Code and are therefore subject to refund. However, the parties have by supplemental stipulation filed January 10, 1966, presented a schedule entitled "Texas maintenance taxes" imposed in retaliation and a stipulation that the said schedule shall comprise "Exhibit 6" in the cause and make it possible to allow the refund prayed for by plaintiffs in respect to the maintenance taxes which were included in the retaliatory computation, but do not constitute taxes in respect to property insurance.

Defendant accordingly, has withdrawn objection to allowing judgments for the following plaintiffs in the following amounts on account of the maintenance taxes under Articles 5.49 and 5.68 of the Texas Insurance Code and Section 28 of Article 8306 of the Texas Workmen's Compensation Law:

Company	1959	1960	Total
Atlantic Insurance Co.	$ 1.64	$ 9.76	$ 11.40
Commercial Standard Ins. Co.	1.44	1.62	3.06
Employers Casualty Ins. Co.	863.50	1138.03	2001.53
General Insurance Corp.	608.76	759.36	1368.12
Gulf Insurance	1374.37	1634.81	3009.18
Houston Fire & Cas. Ins. Co.	398.22	375.66	773.88
International Service Ins. Co.	2.21	1.63	3.84
Marathon Insurance Co.	———	7.16	7.16
National Standard Ins. Co.	.25	———	.25
Republic Insurance Co.	171.63	257.98	429.61
Security National Ins. Co.	.07	———	.07
Superior Insurance Co.	510.93	766.13	1277.06
Transport Insurance Co.	351.46	420.74	772.20
Trinity Universal Ins. Co.	756.85	776.54	1533.39
United Services Automobile Assn.	205.66	326.13	531.79
Vanguard Insurance Co.	———	458.58	458.58

Judgment in favor of the specified plaintiffs in the stated amounts should therefore be ordered.

With regard to the amounts due the plaintiffs specified above for the year 1959, such plaintiffs shall be entitled to interest at 6% from 15 June 1960 to the date of judgment; and with regard to the amounts owing to said plaintiffs for the year 1960, such plaintiffs shall be entitled to interest at the rate of 6% from 15 June 1961 until the date of judgment.

IX

As indicated in Conclusion of Law No. V, and Conclusion of Law No. II, paragraph A, supra, defendant properly refused to allow inclusion, as part of the California tax burden for retaliatory tax computations, of the real estate taxes paid by the Houston Fire and Casualty Insurance Company and the Republic Insurance Company on real property in the State of California owned by them

and on which, in each case, was located the particular insurer's principal office in California.

X

The retaliatory law of 1959 (sections 685-685.4, Insurance Code) merely changed a component of the tax imposed under section 14 4/5 of Article XIII of the Constitution. It became effective during the year 1959 and applied, in the appropriate cases, to taxes imposed by that section in respect to premiums received on business done in California during the calendar year 1959, which taxes were accordingly assessed and collected in the calendar year 1960. All the taxes specified in Column Two of Schedule A on pages 5 and 6 of the stipulations fall within this description.

XI

In respect to the interest charges specified in said Schedule A of the stipulations, these were based upon the failure to include the retaliatory tax in plaintiffs' remittances made on or before June 15, 1960, as required by section 12622, Revenue and Taxation Code as then in effect through enactment effective April 1, 1959 by Chapter 39 (page 1892) of volume 1 of the Statutes of 1959. Each such amount of tax became delinquent and interest began to run on June 15, 1960, and was not affected by the enactment of sections 12287 and 12290 of that Code in Chapter 44 (p. 984) of the Statutes of 1961, since the charges and interest involved accrued prior to the effective date (April 1, 1961) of the latter statute.

XII

Except as specified in Conclusion of Law No. VIII, supra, defendant is entitled to judgment in its favor on all issues specified in the stipulation and on all causes of action; except that the plaintiffs specified in Conclusion of Law No. VIII are entitled to judgments in the respective amounts specified therein.

Dated: January 26, 1966

H. A. van der Zee
Judge of the Superior Court
H. A. van der Zee

All the plaintiffs, through their counsel, reserve all objections to the foregoing findings of fact and conclusions of law with the exception of paragraph VIII of said conclusions to which plaintiffs stipulate, and approve the said Findings of Fact and Conclusions of Law as to form only.

1/24/66

Long & Levit
By Victor B. Levit
Attorneys for Plaintiffs

Entered
Vol A 166 Page 38
February 1, 1966
Martin Mongan, Clerk
By J. Stanfill
Deputy Clerk

Filed
January 31, 1966
Martin Mongan, Clerk
By R. J. Hare
Deputy Clerk

[Title of Court and Cause]

JUDGMENT

The foregoing cause having come on before me for trial and stipulations of the parties having been introduced in evidence or filed and exhibits being designated and filed

pursuant to said stipulations; plaintiffs appearing through their counsel Long and Levit, Bert W. Levit, and Victor B. Levit; defendant appearing by its counsel Thomas C. Lynch, Attorney General of the State of California, by Harold B. Haas, Assistant Attorney General; the parties having filed extended memoranda and briefs and the cause having been orally argued; the Court having duly considered the stipulations, exhibits, briefs and oral argument; the cause having been duly submitted; and the Court having duly made and filed its findings of fact and conclusions of law;

Now, Therefore, it is ordered adjudged and decreed that:

1. The following plaintiffs have judgment for the amounts indicated as to the calendar years specified, in the total amounts shown, with interest at the rate of six per cent (a) in the case of the amounts specified for the calendar year 1959 from June 15, 1960, and (b) in the case of amounts specified for the calendar year 1960 from June 15, 1961, in both cases until the date of allowance of credit on account of this judgment or to a date preceding the date of the refund warrant by not more than thirty days; the date to be determined by the controller pursuant to section 13107, Revenue and Taxation Code:

Company	1959	1960	Total
Atlantic Insurance Co.	$ 1.64	$ 9.76	$ 11.40
Commercial Standard Ins. Co.	1.44	1.62	3.06
Employers Casualty Ins. Co.	863.50	1138.03	2001.53
General Insurance Corp.	608.76	759.36	1368.12
Gulf Insurance	1374.37	1634.81	3009.18
Houston Fire & Cas. Ins. Co.	398.22	375.66	773.88
International Service Ins. Co.	2.21	1.63	3.84
Marathon Insurance Co.	———	7.16	7.16
National Standard Ins. Co.	.25	———	.25
Republic Insurance Co.	171.63	257.98	429.61
Security National Ins. Co.	.07	———	.07
Superior Insurance Co.	510.93	766.13	1277.06
Transport Insurance Co.	351.46	420.74	772.20
Trinity Universal Ins. Co.	756.85	776.54	1533.39
United Services Automobile Assn.	205.66	326.13	531.79
Vanguard Insurance Co.	———	458.58	458.58

2. Plaintiffs recover their costs as provided by law.

3. Except as expressly provided in paragraphs numbered 1 and 2 immediately preceding this paragraph 3 of this judgment, plaintiffs shall take nothing by this action and defendant is dismissed with prejudice.

January 31, 1966

H. A. van der Zee
Judge of the Superior Court
H. A. van der Zee

Approved as to form only and reserving all objections

Long and Levit
By Victor B. Levit
Attorneys for plaintiffs.

Appendix C

§ 685. Declaration of policy: Duration of retaliation: Taxes, licenses and other fees, fines, etc., imposed by political subdivision of other state or country deemed to be imposed by such state or country. When by or pursuant to the laws of any other state or foreign country any taxes, licenses and other fees, in the aggregate, and any fines, penalties, deposit requirements or other material obligations, prohibitions or restrictions are or would be imposed upon California insurers, or upon the agents or representatives of such insurers, which are in excess of such taxes, licenses and other fees, in the aggregate, or which are in excess of the fines, penalties, deposit requirements or other obligations, prohibitions, or restrictions directly imposed upon similar insurers, or upon the agents or representatives of such insurers, of such other state or country under the statutes of this State, so long as such laws of such other state or country continue in force or are so applied, the same taxes, licenses and other fees, in the aggregate, or fines, penalties or deposit requirements or other material obligations, prohibitions, or restrictions, of whatever kind shall be imposed upon the insurers, or upon the agents or representatives of such insurers, of such other state or country doing business or seeking to do business in California. Any tax, license or other fee or other obligation imposed by any city, county, or other political subdivision or agency of such other state or country on California insurers or their agents or representatives shall be deemed to be imposed by such state or country within the meaning of this article.

§ 685.1 Application of article. This article shall not apply as to personal income taxes; nor as to ad valorem taxes on real or personal property nor as to special purpose obligations or assessments heretofore imposed by another state or foreign country in connection with particular kinds of insurance, other than property insurance; except that deductions, from premium taxes or other taxes otherwise payable, allowed on account of real estate or personal property taxes paid shall be taken into consideration in determining the propriety and extent of retaliatory action under this article.

§ 685.2. Domicile of Canadian and other alien insurers. For the purposes of this article the domicile of an alien insurer, other than insurers formed under the laws of Canada, shall be that state in which is located its principal place of business in the United States.

In the case of an insurer formed under the laws of Canada or a province thereof, its domicile shall be deemed to be that province in which its head office is situated.

§ 685.3. Commissioner to enforce execution of § 685: Duty of Board of Equalization, Board of Control and State Controller. To the extent permitted by the Constitution of this State there is hereby imposed upon the commissioner the duty of enforcing the execution of the provisions of Section 685. It shall be the duty of the commissioner to initiate the enforcement and execution of the provisions of Section 685 in respect to all matters which by the Constitution or laws of this State require further or final action by other officials of this State. In respect to any matter initiated by the commissioner, it shall be the duty of the Board of Equalization, Board of Control

and State Controller to complete the enforcement and execution of the provisions of Section 685 in respect to such matter within the scope of the duties and powers of each as set forth in the Constitution and laws of this State.

§ 685.4. Application of article to reciprocals or interinsurance exchanges and fraternal benefit societies. The provisions of this article shall also be applicable to reciprocals or interinsurance exchanges and fraternal benefit societies.

LIBRARY
SUPREME COURT, U. S.

FILED
MAR 20 1968
JOHN F. DAVIS, CLERK

No. 1129

In the Supreme Court of the United States

OCTOBER TERM, 1967

ATLANTIC INSURANCE COMPANY, et al.,
Appellant,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Appellee.

Motion to Dismiss or Affirm

THOMAS C. LYNCH
Attorney General of the State of California

HAROLD B. HAAS
Assistant Attorney General

6000 State Building
San Francisco, California 94102
Tel. 557-0566

Attorneys for Appellee

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

Page

I. Insurance Retaliatory Laws Are in Force in 47 States. Almost a Century of Usage Bears Witness to Their Reasonableness and Workability and the Courts, Including This Court, Have Continuously So Held for Almost a Century 4

II. The Appellant's Jurisdictional Statement Shows That No Substantial Federal Question Is Posed by the Judgment Which Is the Subject of Its Appeal 7

A. The authorities cited by appellants should be read in the light of the Judicial and Congressional history of taxation of the insurance business 7

B. Appellant's authorities do not deal with activities covered by express congressional consent with judicial acceptance, as is the case with the tax here involved 10

TABLE OF AUTHORITIES

Cases	Pages
Baltic Mining Co. v. Mass., 231 U.S. 68; 58 L.Ed. 127, 34 S.Ct. 15	16
Bankers Life Co. v. Richardson, 192 Cal. 113, 218 Pac. 586	5
Cheney Bros. v. Mass., 246 U.S. 147, 62 L.Ed. 632, 38 S.Ct. 295	16
Clark v. Mobile, 67 Ala. 217	6
Clay v. Dixie Fire Ins. Co., 168 Ky. 315, 181 S.W. 1123	6
Comm. v. Firemens Fund Ins. Co., 369 Pa. 560, 87 Atl. 2d 255	6
Connecticut General Life Ins. Co. v. Johnson, 303 U.S. 77, 82 L.Ed. 673, 56 S.Ct. 103	8, 12, 20, 21, 22
Fire Association of Phila. v. New York, 119 U.S. 822, 30 L.Ed. 1342, 7 S.Ct. 108	4, 7, 11, 12, 14
Goldsmith v. Home Ins. Co., 62 Ga. 379	6
Hanover Fire Ins. Co. v. Carr (Harding), 272 U.S. 494, 71 L.Ed. 372, 47 S.Ct. 179, 49 A.L.R. 713	7, 8, 12, 13, 14, 15, 16
Haverhill Ins. Co. v. Prescott, 42 N.H. 547	6
Home Ins. Co. v. Swigert, 104 Ill. 653	3, 4
In re Insurance Tax Cases, 160 Kan. 300, 161 Pac. 2d 726	3, 4
Lincoln National Life Ins. Co. v. Read, 325 U.S. 673, 89 L.Ed. 861, 65 S.Ct. 1220	7, 12, 13, 14
Northwestern Mutual Life Ins. Co. v. Wis., 247 U.S. 132, 62 L.Ed. 1025, 38 S.Ct. 444	16, 22
Ozark Butane Co. v. Oklahoma Liquefied Petroleum Gas Board, 379 U.S. 885, 13 L.Ed. 2d 91, 85 S.Ct. 162, 380 U.S. 928, 13 L.Ed. 2d 817, 85 S.Ct. 932	7, 10, 11
Pacific Mutual Life Ins. Co. v. Lowe, 354 Ill. 398, 188 N.E. 436	6
Paul v. Virginia, 8 Wall. 168, 19 L.Ed. 257	8, 13, 15
Phoenix Ins. Co. v. Welch, 29 Kan. 480, Rptr. 32 Pac. States Rep.	6
Peo. v. Fire Assn. of Phila., 92 N.Y. 311, aff'd. 119 U.S. 110	6

Pages

Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 90 L.Ed. 1342, 66 S.Ct. 1142, 164 A.L.R. 476 ..... 2, 3, 4, 7, 8, 9, 11, 12, 13, 14, 15
Prudential Ins. Co. v. Hobbs, 328 U.S. 823, 90 L.Ed. 1602, 66 S.Ct. 1360 ..... 3, 6, 8, 11, 12, 14

Republic Ins. Co. v. Comr. of Taxation, ... Minn. ....., 138 N.W. 2d 776 5
Reserve Life Ins. Co. v. Bowers, 380 U.S. 258, 13 L.Ed. 2d 959, 85 S.Ct. 951 ..... 8, 12, 15, 17, 18, 19
Robertson v. California, 328 U.S. 440, 90 L.Ed. 1366, 66 S.Ct. 1160 ..... 4, 7, 9

Southern Ry. Co. v. Greene, 216 U.S. 400, 54 L.Ed. 536, 30 S.Ct. 287 ..... 7, 12, 15, 16
State Board of Ins. v. Todd Shipyards, 370 U.S. 451, 8 L.Ed. 2d 620, 82 S.Ct. 1380 ..... 8, 12, 20, 21, 22
State ex rel. Baldwin v. Ins. Co. of N.A., 115 Ind. 257, 17 N.E. 574 6
State ex rel. Texas Co. v. Dickinson, 79 N.J.L. 292, 75 Atl. 803 6
State v. Firemen's Fund, 223 Ala. 109, 134 So. 858, 77 A.L.R. 856 6
State v. Ins. Co. of N.A., 71 Neb. 320, 341, 348, 355, 99 N.W. 36, 100 N.W. 405, 102 N.W. 1022, 106 N.W. 767 6

U.S. v. South-Eastern Underwriters Ass'n., 322 U.S. 533, 88 L.Ed. 1440, 64 S.Ct. 1162 ..... 3, 4, 8, 9, 11, 13

Wheeling Steel Corp. v. Glander, 337 U.S. 562, 93 L.Ed. 1544, 69 S.Ct. 1291 ..... 7, 12, 17, 18, 19

STATUTES

Calif. Ins. Code, sec. 685.1 15
McCarran Act, 59 Stat. 33, 34, 15 U.S.C. §§ 1011-1015 1
Retaliatory Statutes of the States, see ftn. 6 4-5

OTHER AUTHORITY

29 Notre Dame Lawyer 249 4

No. 1129

In the Supreme Court of the United States

OCTOBER TERM, 1967

ATLANTIC INSURANCE COMPANY, et al.,
Appellant,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Appellee.

Motion to Dismiss or Affirm

Appellee moves to dismiss the appeal or affirm the judgment on the ground that no substantial Federal question is presented by the appellant's jurisdictional statement.

This Court has held that state insurance retaliatory statutes such as the one here at issue, are included within the terms of the "McCarran Act"[1] (59 Stat. 33, 34, 15 U.S.C. Secs. 1011-1015) which declared existing state insurance regulatory and tax laws to be in the public interest. This Court accepted that declaration as determinative of the

1. Sometimes called the "McCarran-Ferguson Act."

validity of a state law taxing foreign insurers but not domestic ones, the base of the tax being the gross premiums on the business done by such foreign insurers in the taxing state. *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408.[2] In that case this Court discussed the enactment of the McCarran Act, supra, and went on to say:

> "'Two conclusions, corollary in character and important for this case, must be drawn from Congress' action and the circumstances in which it was taken. One is that Congress intended to declare, and in effect declared, that uniformity of regulation, and of state taxation, are not required in reference to the business of insurance by the national public interest, except in the specific respects otherwise expressly provided for. This necessarily was a determination by Congress that State taxes, which in its silence might be held invalid as discriminatory, do not place on interstate insurance business a burden which it is unable generally to bear or should not bear in the competition with local business. Such taxes were not uncommon among the states, and the statute clearly included South Carolina's tax now in issue." 328 U.S. 408, 431

Following further discussion of Congressional power over interstate commerce, this Court concluded that

> "* * * the argument that the degree of discrimination which South Carolina's tax has involved, if any, puts it beyond the power of government to continue must fall of its own weight. No conceivable violation of the commerce clause, in letter or spirit, is presented. *Nor is contravention of any other limitation.*" (328 U.S. 408, 436, emphasis supplied)

The opinion next deals with contentions that the tax violates the "due process" and "equal protection" clauses of

---

2. Unofficial parallel citations to the United States Reports will be found in the Table of Cases preceding this motion.

the Constitution. The Court forcibly repudiates these arguments:

> "As for the due process contention, it was settled by a long line of authorities prior to the South-Eastern[3] decision, that the similar provision of the Fourteenth Amendment, as well as that requiring equal protection of the law, does not forbid the states to lay and collect such a tax as South Carolina's. Certainly the Fifth Amendment does not more narrowly confine the power of Congress; nor do it and the Fourteenth taken together accomplish such a restriction upon the co-ordinated exercise of power by the Congress and the states." (328 U.S. 437-438)

As stated above, this Prudential case dealt with the validity of a tax imposed upon companies foreign to the taxing state, measured by gross premiums received on business done in the taxing state by those companies but not imposed on that state's domestic companies.

In *Prudential Insurance Co. et al. v. Hobbs,* 328 U.S. 823, this Court affirmed the Kansas Supreme Court's judgments upholding the constitutionality of statutes which not only (a) imposed a premium tax similar to that which was the subject of *Prudential v. Benjamin, supra,*[4] but also (b) imposed license fees for appointments of insurance agents, (c) imposed a fireman's relief fund tax on foreign fire insurance companies, and (d) *exacted a retaliatory tax similar to the tax involved in this case. In re Insurance Tax Cases,* 160 Kan. 300, 161 Pac. 2d 726.

---

3. *U.S. v. South-Eastern Underwriters,* 322 U.S. 533.

4. As in *Prudential v. Benjamin,* this tax was measured by premiums received on business done in the state and applied only to companies foreign to Kansas. 160 Kan. 300, 161 Pac. 2d 726, 731, 734.

This Court affirmed the judgments in that case without opinion, citing only *Prudential Insurance Co. v. Benjamin, supra,* and *Robertson v. California,* 328 U.S. 440. The latter case passes upon regulatory rather than simply tax matters (328 U.S. 440, 443). In view of this affirmance by this Court, of the state decision holding its retaliatory tax statute valid, on the authority of *Prudential v. Benjamin,* we submit that appellant's appeal presents no substantial Federal question.

The foregoing is what might well be called the "bare bones" of our contention. We proceed now with the factual and legal background—the meat.

I. Insurance Retaliatory Laws Are in Force in 47 States. Almost a Century of Usage Bears Witness to Their Reasonableness and Workability and the Courts, Including This Court, Have Continuously So Held for Almost a Century.

Insurance retaliatory laws, of the nature of the one involved in this action, began to be enacted in the immediate post-Civil-War period[5] and spread over the country. While it is said that 14 states repealed such laws immediately following the decision in *U.S. v. South-Eastern Underwriters,* 322 U.S. 533, (29 Notre Dame Lawyer 249), a count in 1966 developed the existence of such laws in 47[6] states.

---

5. *Fire Assn. of Philadelphia,* 119 U.S. 110 cites an 1865 New York enactment of such a statute. *In re Insurance Tax cases,* 160 Kan. 300, 161 Pac. 2d 726 cites an initial Kansas enactment in 1871.

6. Ala. Code title 51, § 825 (1940)—held unconstitutional, see below; Ariz. Rev. Stat. Ann. § 20-230 (1956); Ark. Stat. Ann. § 66-2225 (Supp. 1961); Cal. Ins. Code § 685-685.4 (Supp.) (Cal. Rev. & Tax Code §§ 12281-12290 (Supp.) specifies procedure for the collection of the retaliatory tax); Colo. Rev. Stat. Ann. § 72-1-14 (Perm. Supp. 1960); Conn. Gen. Stat. Rev. §§ 12-211 (Supp. 1962), 38-22 (1958); Del. Code Ann. tit. 18, § 2709 (Supp. 1962); Fla. Stat. Ann. § 624.0228 (1960); Ga. Code Ann. § 56-321 (1960); Idaho Code Ann. § 41-1011 (1961); Ill. Ann. Stat. ch. 73, § 1056 (Smith-Hurd, Supp. 1963); Ind. Ann. Stat. § 39-5012 (1952); Iowa Code Ann. § 505.14 (Supp. 1962); Kan. Gen. Stat. Ann.

As at present in force in these states this legislation typically comprises a statute of State "A", providing that an insurance company of State "B" must pay, for the privilege of doing an insurance business in State A, the total of the taxes and governmental charges imposed by its "home" State B (state of incorporation) on a similar company of State A doing business in State B, if this total is higher than the "normal" tax of State B; in short and to slightly over-simplify: a company of State B cannot do business in State A for a lower amount of governmental charges than a company of State A would pay to do the same business in State B.

As pointed out by both California and Minnesota appellate opinions and many others[7] the statute is not motivated

---

§ 40-253 (Supp. 1961); Ky. Rev. Stat. § 304.110 (1960); La. Rev. Stat. § 22:1079 (1959); Me. Rev. Stat. Ann. ch. 60, § 53 (Supp. 1963); Md. Ann. Code art. 48A, § 61 (Sup. 1963); Mass. Gen. Laws Ann. ch. 175, § 159 (1959); Mich. Stat. Ann. §§ 24.1430, 24.1476 (1957); Minn. Stat. Ann. § 71.23 (Supp. 1963); Mo. Ann. Stat. § 375.450 (Supp. 1963); Mont. Rev. Codes Ann. § 40-2826 (1947); Neb. Rev. Stat. §§ 44-149 to -153 (1960); Nev. Rev. Stat. 683.101 (1965); N.H. Rev. Stat. Ann. §§ 405:53-59 (1955); N.J. Rev. Stat. § 17:32-15 (1963); N.M. Stat. Ann. §§ 58-5-27, -49 (1953); N.Y. Ins. Laws § 61; N.C. Gen. Stat. § 58-192 (1960); N.D. Rev. Code § 26-01-05 (1960); Ohio Rev. Code Ann. § 3905.41 (Page 1954) (see also the reciprocal provision for retaliatory laws applicable to mutual insurance companies in § 3941.25); Okla. Stat. Ann. tit. 36, § 628 (1958); Ore. Rev. Stat. § 736.237 (1961); R.I. Gen. Laws Ann. § 27-2-17 (1956); S.C. Code § 37-132 (1962); S.D. Code § 31.1112 (Supp. 1960); Tenn. Code Ann. § 56-309 (Supp. 1963); Tex. Ins. Code Ann. art. 21.46 (1963); Utah Code Ann. § 31-14-9 (Supp. 1963); Vt. Stat. Ann. tit. 8, § 3367 (1958); Va. Code Ann. § 38.1-87 (1950); Wash. Rev. Code Ann. § 48.14.040 (1961); W. Va. Code Ann. § 3323 (1961); Wis. Stat. Ann. §§ 76.35-36 (1957); Wyo. Comp. Stat. Ann. 26-45 (1957).

7. *Bankers' Life Co. v. Richardson*, 192 Cal. 113, 124; *Republic Ins. Co. v. Comr. of Taxation* ..... Minn. ....., 138 N.W. 2d 776, 779-780.

See similar comments in cases cited in 91 A.L.R. 795-797.

There is a quirk in appellants' claim of discriminatory application of the law. As the Court of Appeal opinion points out, the

by any desire to discriminate but is simply a long sanctioned means of equalizing tax differentials between insurance companies of different states doing business in several states.

In no case has a State or Federal Appellate Court held such legislation unconstitutional, with the sole exception of Alabama.[8] But eight jurisdictions, including this Court, have squarely held such a statute to constitute a reasonable classification, or to be non-discriminatory, as against contentions of the nature made by appellant here.[9] Certainly these cases constitute part of that body of experience demonstrating the basis for the Congressional determination, as a fact, of the reasonableness of existing state tax and regulatory legislation in the insurance field; the *experience* to which

---

Texas premium tax law so applied as to result in 91+% of insurers foreign to Texas paying premium tax on Texas business at the rate of 3.85%, while *all* Texas companies paid at the rate of 1.1%; less than a third of the rate paid by the 91% of the foreign companies (Typewritten opinion in the Record, pp. 6-7; Appendix A to Jurisdictional statement, pp. vi-viii) This, of course, is what triggered application of the California retaliatory tax in this case.

8. *State v. Firemen's Fund,* 223 Ala. 109, 134 So. 858, 77 A.L.R. 856; *Clark v. Mobile,* 67 Ala. 217.

9. Held reasonable classification or non-discriminatory: *Prudential Ins. Co. v. Hobbs,* 328 U.S. 822, see 160 Kan. 300, 161 Pac. 2d 726; *Commonwealth v. Firemen's Fund Ins. Co.,* 369 *Pa.* 560, 87 Atl. 2d 255, 258; *State ex rel Baldwin v. Ins. Co. of North Amer.,* 115 *Ind.* 257, 17 N.E. 574, 579; *State v. Ins. Co. of N.A.,* 71 *Neb.* 320, 341, 348, 355, 99 N.W. 36, 39-40, 100 N.W. 405, 102 N.W. 1022, 106 N.W. 767; *Pacific Mutual Ins. Co. v. Lowe,* 354 *Ill.* 398, 188 N.E. 436; *Phoenix Ins. Co. v. Welch,* 29 *Kan.* 480, 484 (also printed in vol. 32 of Pacific States Reports); *Clay v. Dixie Fire Ins. Co.,* 168 *Ky.* 315, 181 S.W. 1123, 1125.

Held condition of admission to state or of doing business therein: *Peo. v. Fire Assn. of Phila.,* 92 *N.Y.* 311, *affd.* 119 *U.S.* 110.

Held not delegation of legislative power but condition of legislation: *State ex rel. Texas Co. v. Dickinson,* 79 *N.J.L.* 292, 75 Atl. 803; *State ex rel. Baldwin, supra; Peo. v. Fire Assn., supra; Phoenix Ins. Co. v. Welch, supra; Home Ins. Co. v. Swigert,* 104 *Ill.* 653; *Goldsmith v. Home Ins. Co.,* 62 *Ga.* 379; *Haverhill Ins. Co. v. Prescott,* 42 *N.H.* 547; *Clay v. Dixie Fire Ins. Co., supra.*

this Court referred in *Prudential v. Benjamin*,[10] and again in *Robertson v. California*.[11] Certainly the appellant's jurisdictional statement sets forth no grounds, and, we submit, the record contains no evidence, which demonstrates any need for judicial reconsideration of the tax consequences of these now long standing doctrines of this and other courts. An examination of the cases cited as authority in the jurisdictional statement will show this; as we shall now demonstrate.

II. The Appellant's Jurisdictional Statement Shows That No Substantial Federal Question Is Posed by the Judgment Which Is the Subject of Its Appeal.

A. The authorities cited by appellants should be read in the light of the Judicial and Congressional history of taxation of the insurance business.

Appellants cite the following cases as supporting their claim that this litigation presents substantial Federal questions (Jurisdictional statement, pp. 6-8):

**Ozark Butane Co., Inc. v. Oklahoma Liquefied Petroleum Gas Board, et al.*, 379 U.S. 885, 380 U.S. 928*

Fire Association of Philadelphia v. New York, 119 U.S. 822 [affirming 160 Kan. 300, 161 Pac. 2d 726]

Lincoln National Life Insurance Co. v. Read, 325 U.S. 673

Prudential Ins. Co. v. Benjamin, 328 U.S. 408

Hanover Fire Ins. Co. v. Carr, 272 U.S. 494

Southern Ry. Co. v. Greene, 216 U.S. 400

Wheeling Steel Corp. v. Glander, 337 U.S. 562

---

10. 328 U.S. 408, 432.

11. 328 U.S. 440, 447.

*Appellant's citation of *Ozark* on page 6 of its jurisdictional statement is not accurate.

Reserve Life Ins. Co. v. Bowers, 380 U.S. 258
State Board of Ins. v. Todd Shipyards, 370 U.S. 451
Connecticut General Life Ins. Co. v. Johnson, 303 U.S. 77

Appellant asserts that the decision in the instant case is in conflict with *Hanover* and the cases following it on that list.

To the contrary, examination of facts and law set forth in these cases reveals no such conflict with the case at bar, as we shall show below.

In order to do so, however, we must direct this Court's attention to the fact—certainly well known to this Court—that the position of the insurance business under the Commerce Clauses of the Constitution has traditionally differed from that accorded to business of other financial organizations and to general industrial, manufacturing and mercantile operations. This difference arose first as a judicially created one, and subsequently by statute.

For in *Paul v. Virginia,* 8 Wall. 168, this Court held that issuing a policy of insurance is not a transaction of commerce and this opinion, with others that followed, was generally regarded as removing transaction of insurance from the operation of the Constitution's "commerce clauses" for many years, until *U.S. v. South-Eastern Underwriters* held otherwise (322 U.S. 533, 543).

Within a year of the *South-Eastern* case, Congress passed the McCarran Act, the nature of which has been set forth at the beginning of this Motion, and this was shortly followed by *Prudential v. Benjamin* and *Prudential v. Hobbs, supra,* in which this Court accepted the Congressional finding that the existing state regulatory and tax systems met the constitutional objections—with a *caveat* as to isolated provi-

sions which might raise constitutional questions other than related to the Commerce Clause (328 U.S. 408, 430).

Thus, except possibly[12] for the period of about nine months between the decision in *South Eastern Underwriters* and enactment of the McCarran Act, the insurance cases involving Federal questions have been litigated and decided on the basis that Commerce Clause restrictions on other businesses have slight, if any, application to interstate insurance transactions, whether this rule be based on the "non-commerce" concept or the *Prudential v. Benjamin* holding that, by the McCarran Act:

> "• • • Congress intended to declare, and in effect declared, that uniformity of regulation, and of state taxation, are not required in reference to the business of insurance by the national public interest, except in the specific respects otherwise provided for. This necessarily was a determination by Congress that state taxes, which in its silence might be held invalid as discriminatory, do not place on interstate insurance business a burden which it is unable generally to bear or should not bear in competition with local business. Such taxes were not uncommon among the states, and the statute clearly included South Carolina's tax now in issue" (328 U.S. 408, 431).

As the brief history of retaliatory statutes above[13] shows, the type of California statute imposing the retaliatory tax involved in this case has long been common among the states and is clearly included within the terms of the McCarran Act.

Against this background we now proceed to evaluate appellant's authorities listed above.

---

12. But see *Robertson v. California*, 328 U.S. 440, 462, as to even this period. The *South-Eastern* case was decided by this Court, June 5, 1944. The McCarran Act was enacted March 9, 1945.

13. See beginning of this motion.

B. Appellant's authorities do not deal with activities covered by express congressional consent with judicial acceptance, as is the case with the tax here involved.

We have established above, we believe, that state insurance retaliatory statutes have long been common in this country, were obviously included as part of the state tax statutes declared to be in the public interest by the McCarran Act, and have been accepted by this Court as covered by that act.

Appellants cite no authority which is in any way contrary to these facts and several which support them. Taking appellant's authorities in the order cited (Jurisdictional Statement, pp. 6-9), this will quickly appear.

The first case cited, *Ozark Butane Co. v. Oklahoma Liquefied Petroleum Gas Board* (379 U.S. 885) is not an insurance case in any sense of the word. It deals only with the right of an Arkansas corporate liquefied gas storer and dispenser to conduct that business in Oklahoma in the face of an Oklahoma statute licensing the business and limiting the license, as to foreign corporations, to those whose home states permit an Oklahoma corporation to transact the same business in those states. Appellants allege that the case presents "many of the same issues as the case at bar" and that [therefore] "[T]his case indicates that this Court felt in 1964 that the issues in this case merited review." (Jurisdictional Statement p. 7)

As we have pointed out above, at this stage of the litigation where the question of the substantiality of the Federal question asserted by appellants is the primary issue, we submit that the existence of the McCarran Act and the decisions of this court following that Act, together with the history of insurance retaliatory legislation and litigation briefly reviewed above, eliminate any reasonable analogy with the butane gas business, which does not have such a history.

Possibly the fact that in *Ozark Butane* the three-judge District Court indiscriminately cited certain insurance cases as supporting certain of its holdings without discussing this history[14] may have contributed to the belief of appellants that an analogy existed, and the possible confusion which could have resulted from this phase of the District Court opinion may well have influenced this Court in noting probable jurisdiction. For such an analogy, however, is fallacious in view of the judicial and legislative history of insurance taxation which we set forth above.

Under *Prudential v. Benjamin* and *Prudential v. Habbs*, a Federal question, if there be one, respecting the validity of state retaliatory statutes regulating the butane gas business has no analogical force in respect to a similar statute concerning the insurance business.

The remaining cases cited by appellants fall under these classifications:

(1) Those prior to *Southeastern*, in which this Court distinguished transaction of insurance from other businesses under the Commerce Clauses (*Fire Association, Lincoln National Life,*) the doctrines of which were broadened by the McCarran Act and the two *Prudential* cases.

(2) Cases dealing with taxes which, unlike the tax in the litigation at bar, were not the taxes on the transaction of insurance business of the sort common in the *pre-McCarran* period, but were efforts to impose a new and different kind of tax. The new tax so imposed, had no impact on the insurance business different than in the case of other types of corporate business, and consequently was held subject to the same tests, respecting the burden thereby cast upon interstate commerce and discrimination under the Fourteenth Amendment, as in the case of mercantile, manufac-

14. See 235 Fed. Supp. 406, 410.

turing and similar businesses (*Hanover, Southern Railway, Wheeling Steel,* and *Reserve Life*).

(3) Cases in which there were insufficient taxable transactions in the forum state to constitute a basis for *any* tax by that state, whether upon transactions of insurance or other business. (*Todd Shipyards, Connecticut General.*)

Appellants, in their discussion (jurisdictional statement, pages 7 and 8) of the cases and the rules it derives from them, simply read the cases as if the peculiar legal history of insurance taxation never existed; as if *Prudential v. Hobbs* and *Prudential v. Benjamin* represented no change in application of the commerce clauses from *Fire Association v. New York* and *Lincoln National Life v. Read;* and as if *Hanover Fire Insurance Co. v. Carr (Harding), Southern Ry. Co. v. Greene, Wheeling Steel Corp. v. Glander,* and *Reserve Life Ins. Co. v. Bowers,* dealt with Congressionally sanctioned and commonly enacted insurance tax legislation.

Because of these implicit assumptions in appellant's statement any attempt to discuss the mentioned cases in terms of appellant's theory presents a task not unlike the proverbial attempt to unscramble an egg.

We therefore limit our discussion to a case by case analysis which, we think, will demonstrate the fallacy of these assumptions of appellant by setting forth the present state of the law as so developed.

One of the earliest of the pre-*McCarran* cases, *Fire Association of Philadelphia v. New York* (1886) 119 U.S. 110, sustained exactly the type of statute later specified in the McCarran Act, against "equal protection" objections by resting on the orthodox "condition of admission" theory: that the license expired annually, that payment of the tax was a condition of the annual renewal, that a corporation of another state had no "citizenship" status in a foreign state

except as granted by the law of the foreign state; that any condition desired could be imposed as a condition of such admission to transact business because of this lack of status; that the entry was therefore for only a year at a time and the corporation lost any status in the state unless it renewed its license. Therefore, since a corporation, unlike a natural person, had no right to do business in the state except as licensed, payment of a license fee which included the protested tax was a proper condition to renewal. In this connection *Paul v. Virginia,* 8 Wall. 868 and the other "non-commerce" cases were also cited. (119 U.S. 110, 117-118)

This reasoning was, as appellant states, again used to sustain unconstitutionality of a tax measure by the gross premiums on business done in the state by a foregin insurance company in *Lincoln National Life Ins. Co. v. Read,* 325 U.S. 673, about a year before *Prudential v. Benjamin,* 325 U.S. 408.

In that *Lincoln* case, however, this Court was careful to point out that, "It is not contended that appellant is engaged in interstate commerce. Hence we do not have presented any question concerning the effect of *United States v. South-Eastern Underwriters Ass'n.,* 322 U.S. 533, 64 S. Ct. 1162, 88 L.Ed. 1440, on the problem." (325 U.S. 673, 678, ftn. 4)

In *Prudential v. Benjamin,* however, this Court went beyond any such limited base for support of the validity of existing state insurance taxation and regulation. *Lincoln* and *Philidelphia Fire Association* are merely mentioned, along with *Hanover Fire Association,* in a footnote as supporting the Court's holding that the due process and equal protection clauses did not forbid a state tax on gross premiums received from business in the state by a foreign insurance company.[15]

---

15. 328 U.S. 408, 438 (ftn. 50).

This Court did not therein discuss the basis for the holdings and, as above pointed out[16] based its sustaining of the tax on its acceptance of the Congressional finding in the McCarran Act, which it interpreted as not requiring uniformity of state insurance taxes as between insurers foreign and those domestic to the State.

It is in the discussion of the two *Prudential* cases that appellants make the first implicit assumption to which we refer. Appellant states that in *Prudential v. Hobbs* and *Prudential v. Benjamin*, the tax law had been in effect prior to the date the companies had been admitted to the respective states and "was being applied to foreign seeking admission *after* that date." (Jurisdictional Statement p. 7)

This is correct as a statement of fact, but is erroneous insofar as it implies that the *Prudential* cases are limited in their effect to the grounds and reasoning of *Fire Association* and *Lincoln National Life*. As we have demonstrated above, the *Prudential* cases stand on no such narrow ground, but on the basis that the McCarran Act was within the Congressional power and covered these taxes.

Incidentally, appellant's fallacy in attempting to restrict the holding of the *Prudential* cases to the quasi-waiver or estoppel grounds and holdings of *Fire Association* and *Lincoln National Life*, is illustrated by its citation of *Hanover Fire Insurance Co. v. Harding (Carr)* as illustrating its thesis that after a company has been unconditionally admitted to a state, it cannot be taxed at higher rate nor made subject to additional burdens not imposed on domestic insurer (Jurisdictional Statement pages 7-8), while the same case was cited by this Court in *Prudential v. Benjamin* as supporting the Court's statement that a long line of authorities settle that neither the due process nor the Equal

16. See opening paragraphs of this Motion.

Protection clauses forbade South Carolina's franchise tax on foreign insurance companies measured by premiums on business done in that state, a tax which clearly falls within the brackets which appellants contend *Hanover* forbade.

The answer is that the *Hanover, Southern Railway, Wheeling Steel Corporation* and *Reserve Life Insurance Company* cases do not deal with taxes on the insurance business as such, but with *ad valorem* taxes on property[17] which in some of these cases was, and in others was not, owned by an insurance company. As the following discussion will show, this Court has refused consistently to apply the doctrine of *Paul v. Virginia* and *Prudential v. Benjamin*, respecting the power of the state to regulate and tax the transaction of insurance by foreign insurers on a different basis than domestic insurers, to ad valorem taxes on property owned by a foreign corporation, whether or not it be an insurer. This has been a perfectly logical and sound distinction since the tax is in such case not a tax on the privilege of transacting the insurance business, but a tax on the privilege of owning property. In such case there is no basis for distinguishing between property owners, whether by citizenship or by occupation.

For in *Hanover Insurance Co. v. Harding (Carr)*, the franchise tax of 2% of the premiums written on business done in the state, exacted from foreign insurance companies only, was unchallenged. (272 U.S. 494, 504). The "net receipts" tax which was the subject of the *Hanover* litigation had long been accepted as a property tax applicable to

17. It was obviously in contemplation of this doctrine that the statute under attack in this case excluded *ad valorem* property taxes from retaliatory consideration: "This article shall not apply • • • as to ad valorem taxes on real or personal property • • • " (Calif. Insurance Code, sec. 685.1, as enacted by Calif. Stats. 1959, Ch. 2120).

assets which in the case of a domestic company would have remained in the state subject to taxation as personal property (272 U.S. 494, 504, 506-507, 516). It was payable to the local governments at the rate of the local property tax. (272 U.S. 494, 501). The feature on the basis of which this Court held the *Hanover* tax invalid was, as the opinion points out, the judicial change in that property tax, which prejudicially deprived foreign companies of the same base for that tax as in the case of domestic companies (272 U.S. 494, 516). This Court held that the discrimination resulting could not be cured by the Illinois Court's label of "occupation" tax.

Likewise, the next case cited, *Southern Railway Company v. Greene,* 216 U.S. 400, deals with the same character of tax, in addition to the fact that no insurance question as such is involved. The tax was "upon the actual amount of the capital employed by • • • [every foreign corporation] • • • in the State; in the amount of $25 of the first $100, 5% on the next $900, and one-tenth of 1% on all the remaining amount of capital so employed." (216 U.S. 400, 401)

The case therefore deals with an *ad valorem* property tax since it was determined by percentages of the value of the stock allocated to business in the taxing state. The case has further been distinguished by this Court from the general rule as to corporate tax classification because of the large and one-purpose nature of investment in railway operating property. *Baltic Mining Co. v. Mass.* 231 U.S. 68, 87-88; *Cheney Bros. v. Mass.* 246 U.S. 147, 156-157; *Northwestern Mutual Life Ins. Co. v. Wis.* 247 U.S. 132, 140.

This distinction between *ad valorem* taxes on property owned by the taxpayer and excise taxes for the privilege of transacting a particular business has been expressly recognized by this Court in the next two cases cited by appellants,

Wheeling Steel Corp. v. Glander, 337 U.S. 562, and *Reserve Life Ins. Co. v. Bowers,* 380 U.S. 258.

In *Wheeling,* the State of Ohio apparently attempted to change the general rule governing the *situs* for taxation of intangible property—accounts receivable in particular. By its statute, intangible property arising out of business transacted in Ohio by a nonresident was subject to taxation, whereas property of a resident arising out of business transacted outside the state was not subject to taxation. This Court commented:

> "Under long-settled principles of our Federation, Ohio was not required to admit these foreign corporations to carry on intrastate business within its borders. The State may arbitrarily exclude them or may license them upon any terms it sees fit, apart from exacting surrender of rights derived from the Constitution of the United States. *Hanover Insurance Co. v. Harding,* 272 U.S. 494, 507; *Connecticut General Co. v. Johnson,* 303 U.S. 77, 79-80. Ohio elected, however, to admit these corporations to transact businesses and operate manufacturing plants in the State. For that privilege they have paid all that the State required by way of franchise or privilege tax, which includes in its measure the value of all property owned and business done in Ohio. §§ 5495, 5497, 5498 and 5499 of the Ohio General Code. See *International Harvester Co. v. Evatt,* 329 U.S. 416. After a state has chosen to domesticate foreign corporations, the adopted corporations are entitled to equal protection with the state's own corporate progeny, *at least to the extent that their property is entitled to an equally favorable ad valorem tax basis. Hanover Insurance Co. v. Harding,*[18] 272 U.S. 494, 510-511; *Power Co. v. Saunders,* 274 U.S. 490, 493, 497. Ohio holds this tax on intangibles to be an *ad valorem* property tax. *Ben-*

18. Note that *Hanover* is here cited as relating to an *ad valorem* tax.

nett v. Evatt, 145 Ohio St. 587, 62 N.E. 2d 345, and in no sense a franchise, privilege, occupation or income tax." (337 U.S. 562, 571, emphasis supplied)

The Court went on to specify the discriminatory effect of the tax:

> "The certificate of the Tax Commissioner discloses how fundamentally discriminatory is the application of this *ad valorem* tax to intangibles when owned by a resident or domestic corporation as contrasted with its application when those are owned by a domesticated corporation or a nonresident. If on the taxing date one of these petitioners and an Ohio competitor each owns an account receivable of the same amount from the same out-of-state customer for the same kind of commodity, both shipped from a manufacturing plant in Ohio and both sold out of Ohio by an agent having an office out of the State appellant's account receivable would be subject to Ohio's *ad valorem* tax and the one held by the competing domestic corporation would not. It seems obvious that appellants are not accorded equal treatment, and the inequality is not because of the slightest difference in Ohio's relation to the decisive transaction, but solely because of the different residence of the owner." (337 U.S. 562, 572)

And the Court accordingly held the tax to be invalid. *Reserve Life Insurance Co. v. Bowers, supra,* is a memorandum decision reading as follows: "Per Curriam. The judgment is reversed and the case is remanded to the Court of Appeals, First Appellate District, Ohio. *Wheeling Steel Corp. v. Glander,* 337 U.S. 562" (380 U.S. 258)

Examination of the decision thus reversed, in ..... Ohio App. ....., 196 N.E. 2d 114, develops again that the complaint of discrimination has to do with the personal

property tax. By Ohio law foreign corporations (including foreign insurers) were subject to tax on their personal property held in Ohio, a tax from which domestic Ohio insurance companies were exempt. Domestic insurance companies were subject to the lower of two taxes, a tax on the capital and surplus or a tax on the gross premiums on Ohio business. The foreign insurance companies,—although the case is unclear on this point—also were taxed on their gross premiums at a higher rate than domestic companies. The Ohio Court held that,

> "Under all the circumstances apparent in the record here, it cannot be considered that the composition of an ad valorem tax on the tangible personal property of a foreign insurance company and otherwise taxing domestic insurance companies by the lesser of two formulae is an improper or unlawful classification of taxpayers or discriminatory either for or against the foreign company." (..... Ohio. App. ....., 196 N.E. 2d 114, 118)

The reversal, then, of this decision by the Supreme Court on the authority of *Wheeling Steel* was both logical and sound. The only difference of fact was that the *Wheeling* tax dealt with *intangible* personal property and this case with *tangible* personal property.

But *Wheeling Steel's* careful distinction of the offending tax from a "franchise, occupation, or income tax" and its comment on the right of equality in *ad valorem taxes* (see quotation from *Wheeling Steel, supra*) and the attempt by the Ohio court in *Reserve Life* to lump the personal property taxes and the franchise taxes in an effort to deny discrimination; which was repudiated by the reversal by the higher court, completely distinguish these cases from those dealing with insurance premium and retaliatory taxes which are strictly excise taxes on transaction of insurance business.

The remaining cases cited by appellants as demonstrating constitutional weakness of the retaliatory law also do not deal with the retaliatory law at all, but with the basic jurisdictional test of the power to impose any franchise tax. These are *Connecticut General Life Insurance Company v. Johnson,* 303 U.S. 77, and *State Board of Insurance v. Todd Shipyards Corporation,* 370 U.S. 451. The point determined by these two cases is a constitutional one, but has nothing to do with retaliatory taxes, but with the very jurisdiction to tax at all.

In the *Connecticut General* case it was held that California's attempt to tax re-insurance premiums as to which the only California contact was the fact that California residents were indirectly involved was a violation of the Fourteenth Amendment. The reinsurance contracts were between Connecticut General and other insurance companies. They provided that Connecticut General would reimburse the other companies for certain losses in connection with other companies' California business. Under each reinsurance contract the second company was the insured, and Connecticut General was the insurer. No California resident had any rights under the reinsurance contract. No act concerned with the reinsurance contract took place in California nor did the contract itself provide for any act to be performed in California. This Court reversed the California Supreme Court decision by holding that there were insufficient California contacts to entitle California to tax the business:

> "As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition, we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it. Hence it is that a state which controls the property and activities within its boundaries of a

foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere." (303 U.S. 77, 80-81)

In *State Board of Insurance v. Todd Shipyards,* 370 U.S. 451, a corporation foreign to Texas owned shipyards in that state. It placed insurance thereon in insurers not licensed in Texas. This court summarized the facts as follows:

"The insurance transactions involved in the present litigation take place entirely outside Texas. The insurance, which is principally insurance against loss or liability arising from damage to property, is negotiated and paid for outside Texas. The policies are issued outside Texas. All losses arising under the policies are adjusted and paid outside Texas. The insurers are not licensed to do business in Texas, have no office or place of business in Texas, do not solicit business in Texas, have no agents in Texas, and do not investigate risks or claims in Texas.

"The insured is not a domiciliary of Texas but a New York corporation doing business in Texas. Losses under the policies are payable not to Texas residents but to the insured at its principal office in New York City. The only connection between Texas and the insurance transactions is the fact that the property covered by the insurance is physically located in Texas." (370 U.S. 451, 454-455).

This Court held that Texas law purporting to impose a tax on premiums paid for insurance to an insurer not licensed in Texas unless placed through a Texas agent, was invalid.

In both *Connecticut General* and *Todd Shipyards,* the Court cited and followed a line of cases which has long held that where the insurance transactions had no con-

tact with a state except that the insured risk was located therein, that state could not tax the insurance transaction. In *Todd Shipyards* the Court expressly relied upon Congressional reports during debate that indicated that the McCarran Act's reference to state taxation of insurance included the restrictions on state power imposed by *Connecticut General* and other cases cited therein.

But both cases, and their cited predecessors, dealt with taxation by a state of insurance transactions outside the state. Both the retaliatory tax and the normal gross premiums tax, however are franchise taxes laid on business done *in* the taxing state.

Finally we note that this Court has given the best answer to the last paragraph of appellant's jurisdictional statement:

> "A state does not surrender or abridge its power to change and revise its taxing system and tax rates by merely licensing or permitting a foreign corporation to engage in local business and acquire property within its limits; and second, that 'a state may impose a different rate of taxation upon a foreign corporation for the privilege of doing business within the state than it applies to its own corporations upon the franchise which the state grants in creating them.'" *Northwestern Mutual Life Ins. Co. v. Wisconsin,* 247 U.S. 132, 140.

As we have shown, this court has already clearly answered the Federal questions which appellants assert are substantial. Nor have appellants set forth any new facts or problems which give any occasion for reconsidering those answers. State taxing systems have for over twenty years operated on the basis of those answers. The appeal should be dismissed or the judgment affirmed.

Respectfully submitted,

THOMAS C. LYNCH
Attorney General of the State of California

HAROLD B. HAAS
Assistant Attorney General

Attorneys for Appellee

LIBRARY
UPREME COURT, U. S.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1967

No. 1129

Office-Supreme Court, U.S.
FILED
MAR 21 1968
JOHN F. DAVIS, CLERK

ATLANTIC INSURANCE COMPANY, COMMERCIAL INSURANCE COMPANY, COMMERCIAL STANDARD INSURANCE COMPANY, EMPLOYERS CASUALTY COMPANY, GENERAL INSURANCE CORPORATION, GULF INSURANCE COMPANY, HOUSTON FIRE AND CASUALTY INSURANCE COMPANY, INTERNATIONAL SERVICE INSURANCE COMPANY, MARATHON INSURANCE COMPANY, NATIONAL STANDARD INSURANCE COMPANY, REPUBLIC INSURANCE COMPANY, SECURITY NATIONAL INSURANCE COMPANY, SOUTHERN INSURANCE COMPANY, SUPERIOR INSURANCE COMPANY, TRANSPORT INSURANCE COMPANY, TRINITY UNIVERSAL INSURANCE COMPANY, UNITED SERVICES AUTOMOBILE ASSOCIATION, VANGUARD INSURANCE COMPANY,

Appellants,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal from the Court of Appeal of the State of California, First Appellate District, Division Four

BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS OR AFFIRM

BERT W. LEVIT
465 California Street
San Francisco, California 94104

VICTOR B. LEVIT
465 California Street
San Francisco, California 94104

Counsel for Appellants

Of Counsel

LONG & LEVIT
465 California Street
San Francisco, California 94104

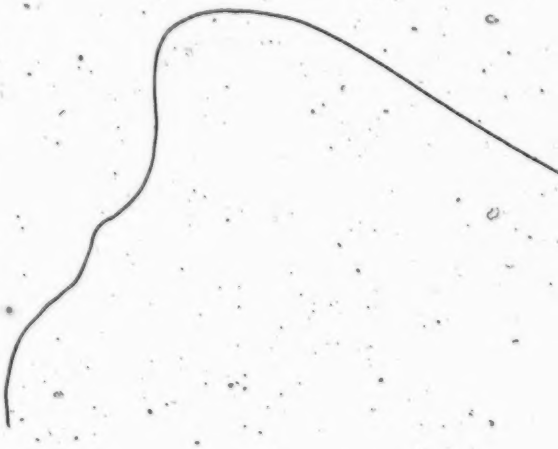


Table of Authorities Cited

Cases	Pages
Fire Association of Philadelphia v New York (1886) 119 US 110	2
Hanover Fire Ins Co v Carr (1926) 272 US 494	2, 3
Lincoln National Life Ins Co v Read (1945) 325 US 673	2
Prudential Ins Co v Benjamin (1946) 328 US 408	2
Prudential Ins Co v Hobbs (1946) 328 US 823	2
Reserve Life Ins Co v Bowers (1965) 380 US 258	2
State Board of Ins v Todd Shipyards (1962) 380 US 451	2
Southern Railway Co v Green (1910) 216 US 400	2, 3
United States v South-Eastern Underwriters Association (1944) 322 US 533	2

Statutes	
McCarran Act (15 USC Sections 1011-1015)	1, 2

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1967

No. 1129

ATLANTIC INSURANCE COMPANY, COMMERCIAL INSURANCE COMPANY, COMMERCIAL STANDARD INSURANCE COMPANY, EMPLOYERS CASUALTY COMPANY, GENERAL INSURANCE CORPORATION, GULF INSURANCE COMPANY, HOUSTON FIRE AND CASUALTY INSURANCE COMPANY, INTERNATIONAL SERVICE INSURANCE COMPANY, MARATHON INSURANCE COMPANY, NATIONAL STANDARD INSURANCE COMPANY, REPUBLIC INSURANCE COMPANY, SECURITY NATIONAL INSURANCE COMPANY, SOUTHERN INSURANCE COMPANY, SUPERIOR INSURANCE COMPANY, TRANSPORT INSURANCE COMPANY, TRINITY UNIVERSAL INSURANCE COMPANY, UNITED SERVICES AUTOMOBILE ASSOCIATION, VANGUARD INSURANCE COMPANY,

Appellants,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal from the Court of Appeal of the State of California, First Appellate District, Division Four

BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS OR AFFIRM

Appellee attempts to sustain the decision below on the authority of the McCarran Act (15 USC §§1011-1015),

Prudential Ins Co v Benjamin (1946) 328 US 408, and *Prudential Ins Co v Hobbs* (1946) 328 US 828. The statute and cases mentioned merely hold that any *general* attack on state taxation of insurance because insurance is interstate commerce will not be allowed. But these authorities do not validate what would have been unconstitutional prior to *United States v South-Eastern Underwriters Association* (1944) 322 US 533.

Prudential v Benjamin decides no more than had already been decided in *Lincoln National Life Ins Co v Read* (1945) 325 US 673 [see footnote 40 of *Prudential v Benjamin*]. *Prudential v Hobbs* was factually the same as *Fire Association of Philadelphia v New York* (1886) 119 US 110 [note Justice Harlan's dissent in the *Fire Association* case]. *Fire Association* holds that retaliatory taxes are only constitutional where imposed as a condition for the admission of the insurer into the state. *Hanover Fire Ins Co v Carr* (1926) 272 US 494 decides that when a foreign insurer has been admitted to a state unconditionally it may not later be discriminated against. *Hanover* was not affected by the McCarran Act.

Reserve Life Ins Co v Bowers (1965) 380 US 258 and *State Board of Ins v Todd Shipyards* (1962) 380 US 451 clearly establish that the McCarran Act did not foreclose constitutional attack on state tax measures where an insurer is involved.

Appellee argues that while ad valorem taxes on property may not be discriminatory there is no constitutional prohibition against discriminatory franchise taxes. *Southern Railway Co v Greene* (1910) 216 US 400 was a case involving a discriminatory franchise tax, and it was held

unconstitutional. *Southern Railway* was relied upon by this Court in *Hanover,* discussed supra, so there is no merit in the distinction appellee seeks to make. The key question is whether the foreign company has been unconditionally admitted to do business in the state [not disputed here], and if it has, discrimination against the foreign insurer is unconstitutional.

Appellee points to the fact that 47 states have retaliatory laws. We do not challenge the constitutionality of these laws except to the extent that they are applied to foreign insurers which have been unconditionally admitted to a state. The large number of states which have such laws points up the potential seriousness of the constitutional problem involved.

DATED: 22 March 1968.

Respectfully submitted,

BERT W. LEVIT

VICTOR B. LEVIT

Counsel for Appellants

Of Counsel

LONG & LEVIT

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

ATLANTIC INSURANCE CO. ET AL. *v.* STATE BOARD OF EQUALIZATION OF CALIFORNIA.

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT.

No. 1129. Decided April 1, 1968.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.